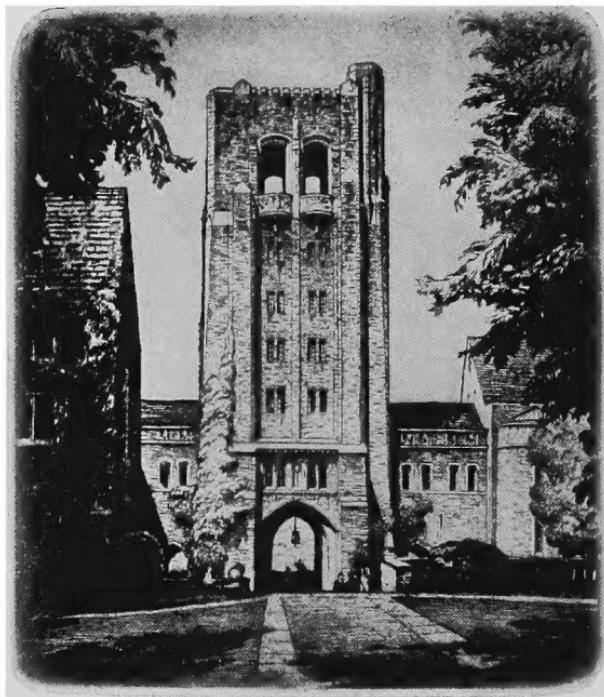




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QUESTIONS AND ANSWERS

FOR

LAW STUDENTS.

BY

EDWIN BAYLIES,

COUNSELOR AT LAW.

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PREFACE.

The preparation of this work was commenced in the belief that a small volume, combining some of the most important of the elementary principles of the law with the outlines of practice under the Code, might be deemed worthy of a place on the shelf of the law student. It was thought that, to the solitary student in the office of the practicing attorney, it might be useful in inducing a more methodical and systematic course of study; that to the student in the law school, it would be useful in begetting a habit of applying theory to questions of fact; and that to both, it might prove a convenient means of testing the extent and accuracy of their knowledge of legal principles and the rules of practice.

For the purpose of placing these principles sharply before the mind of the student, the subject-matter of this volume has been arranged in the form of questions and answers. The subjects treated are those, which, under rule second of the Supreme Court, form the basis of the examination of students for admission to the bar. As will be seen from the Table of Contents, the classification of these subjects is substantially that of the rule above mentioned, and each subject has been made the heading of a chapter. These chapters have been made comparatively full or brief, as the limits of the work and the importance of the subject seemed to demand. The authorities given are text-books

to be found on the shelves of nearly every law library. Where a late statute has modified the former rule, or a recent decision has furnished an important modification or illustration of the general rule, the statute and decision have been cited.

No apology will be offered for the deficiencies of this work. If its matter and manner are such as to utterly condemn it, it will soon lie forgotten on the shelves of the book-seller, where it will at least do no harm. If, on the other hand, it shall be deemed worthy of a corner in the student's library, and in any way tends to divert even a few aspirants for legal honors from the mere reading to the study of the law, and above all, if it shall be successful in impressing on the mind of the student how few simple legal questions he is able to answer confidently without referring to his books, this volume will not have been written in vain.

In submitting this volume to the consideration of the law student, the undersigned takes pleasure in acknowledging his indebtedness to CHAS. THEO. BOONE, Counselor at Law, whose assistance in the preparation of these pages has made the task a pleasure, but whose modesty forbids that his name should appear on the title page.

September 1, 1873.

E. B.

QUESTIONS AND ANSWERS

FOR

LAW STUDENTS.

CHAPTER I.

LAWS IN GENERAL.

1. *What is meant by “law,” in its most general and comprehensive sense?*

In its most general and comprehensive sense, the term *law* signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. So, a general definition of the word *law* has been given as the command of a superior. 1 Shars. Bl. Com. 38, 39, note.

2. *In its more limited and usual signification, what is to be understood by the word law?*

Law, in its more confined sense, has reference to *human* conduct, and has been defined to be “a rule of human action, prescribed and promulgated by sovereign authority, and enforced by sanction of reward or punishment.” Best on Evidence, Int. 1.

3. *What is that law called by which a particular State or nation is governed?*

The law which governs a particular State or nation is called *municipal* or *civil* law, and is defined to be a rule of civil conduct prescribed by the supreme power in the State 1 Shars. Bl. Com. 44; 1 Kent’s Com. 446.

4. What is meant by the sovereign or supreme power in a State?

By the sovereign power is meant the making of laws, for, wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. This sovereignty or supreme power in every State resides ultimately in the body of the people. 1 Shars. Bl. Com. 49, note.

5. Of what is municipal law composed?

Municipal law is composed of written and unwritten, or statute and common law. 1 Kent's Com. 446.

6. What does the unwritten, or common law, include?

It includes those principles, usages and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. These rules and maxims receive their binding power, and the force of laws, by long and immemorial usage, without any legislative act or interference. 1 Shars. Bl. Com. 64; 1 Kent's Com. 472.

7. What is statute, or written law?

Statute, or written law, is the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities; and it is a principle in the English law that an act of parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice. 1 Kent's Com. 446; 1 Shars. Bl. Com. 91; Potter's Dwarris on Statutes, 44.

8. Does this principle in the English law, as to the omnipotence of parliament, prevail in the United States?

It does not; for the law with us must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution of its particular State, and, if it infringes the provisions of either, it is so far void. If, however, there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sov-

ereign power under any other form of government. 1 Kent's Com. 448; Potter's Dwarris on Statutes, 45.

9. Have our courts of justice a right to pronounce whether a statute be or be not constitutional?

They have; and it has become a settled principle, in the legal polity of this country, that it belongs to the judicial power, as a matter of right and of duty, to declare every act of the legislature, made in violation of the constitution, or of any provision of it, null and void. 1 Kent's Com. 450.

10. Give the distinction between public acts and private acts.

A public act is a universal rule that regards the whole community, while private acts are those which concern only a particular locality, thing or class of persons. Generally speaking, statutes are public; and a private statute may rather be considered an exception to the general rule. Potter's Dwarris on Statutes, 62; 1 Kent's Com. 459; 1 Shars. Bl. Com. 85.

11. When does a statute take effect?

It is now the settled rule that a statute, when duly made, takes effect from its date, when no time is fixed. In this State it is provided that every law, unless a different time be prescribed therein, shall commence and take effect throughout the State on, and not before, the twentieth day after the day of its final "passage." 1 Kent's Com. 454; Potter's Dwarris on Statutes, 101.

12. From whence did we derive the chief body of American common law?

It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. 1 Kent's Com. 473; Potter's Dwarris on Statutes, 43.

13. What portions of the law of England were adopted by the State of New York?

By the constitution of 1777, it was declared that such parts of the common law of England, and of the statute law of England and Great Britain as, together with the acts of the colonial legislature, formed the law of the colony on the 19th of April, 1775, should continue to be the law of the State, subject to alteration by the legislature. Such parts as are repugnant to the constitution are abrogated. Potter's Dwarris on Statutes, 43.

14. Where is the best evidence of the common law to be found?

It is to be found in the decisions of the courts of justice, contained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of the English history down to the present time. The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of common law. 1 Kent's Com. 473.

15. To what extent is a decision upon a point of law, arising in any given case, binding as authority in a similar case?

If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. 1 Kent's Com. 475, 476.

16. Of what parts may every law be said to consist?

Every law may be said to consist of four parts. 1. The *declaratory*, which defines the rights to be observed and the wrongs to be eschewed; 2. The *directory*, by which the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs; 3. The *remedial*, which points out a method to recover private rights or redress private wrongs; 4. The *sanction*, or *vindictory* branch of the law, which specifies the evil or penalty incurred by such

as commit any public wrong, and transgress or neglect their duty. 1 Shars. Bl. Com. 54.

17. What is to be understood by the Roman, or civil law, as distinguished from the common law?

By the Roman, or civil law, is generally understood the civil or municipal law of the Roman empire, as comprised in the institute, the code, and the digest of the Emperor Justinian, and the novel constitutions of himself and some of his successors. It constitutes the principal basis of the unwritten or common law of most of the states of Europe, of the Spanish American States, and of one of the United States, namely, Louisiana. 1 Shars. Bl. Com. 81; 1 Kent's Com. 515.

18. What is the fairest and most rational method of interpreting laws?

By exploring the intentions of the legislator at the time when the law was made, by signs the most natural and probable. These signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law. 1 Shars. Bl. Com. 59; Potter's Dwarris on Statutes, 175, 179.

19. In construing a statute, in what sense are words generally to be understood?

They are generally to be understood in their usual and best known signification. Terms of art, or technical terms, must be taken according to their learned use in each art, trade and science. If the sense of the words be still dubious, we may establish their meaning from the context. Thus, the preamble is often called in to aid in the construction of the body of a statute. 1 Shars. Bl. Com. 59, 60; Potter's Dwarris on Statutes, 188; 1 Kent's Com. 462.

20. Have our courts the power to declare a legislative act void because it conflicts with their opinion of natural rights or justice?

They have not. All that they can do with odious statutes is to chasten their hardness by construction, for the legislature possesses a right certainly equal, if not superior, to that of the

courts to determine what laws are consistent with the abstract principles of natural justice. Potter's Dwarris on Statutes, 79, 81.

21. What is the general rule as to the construction of penal statutes?

Penal statutes must be construed strictly ; but they are to be construed strictly in the sense that the case in hand must be brought within the definition of the law, but not so strictly as to exclude a case which is within its words taken in their ordinary acceptation ; that is, there is no peculiar technical meaning to be given to language in penal, more than in remedial statutes. 1 Shars. Bl. Com. 88, note 29 ; Potter's Dwarris on Statutes, 246.

22. What other kinds of statutes, besides penal statutes, are construed strictly?

* Laws made in derogation of common right are to be construed strictly, as, for example, statutes for any cause disabling any person of full age and sound mind to make contracts. So statutes conferring exclusive privileges on corporations or individuals fall under this rule. In the same class are statutes which impose restrictions on trade or common occupations, or which levy a tax upon them. So a statute conferring authority to impose taxes, or exempting property from taxation, or involving the liberty of the citizen, must be construed strictly. Potter's Dwarris on Statutes, 251, 259 ; 1 Shars. Bl. Com. 88, note 29.

23. What is the general rule as to the pleading of statutes?

Courts of law are bound to take notice judicially and *ex officio* of a public act, without its being particularly pleaded or formally set forth by the party who claims advantage under it ; but private acts must be specially pleaded, otherwise the judges will take no notice of them. Potter's Dwarris on Statutes, 52, 53 ; 1 Kent's Com. 460.

24. What is to be understood by international law, or the "law of nations?"

* By this law we are to understand that code of public instruction which defines the rights and prescribes the duties of

nations in their intercourse with each other. According to the observation of Montesquieu, it is founded on the principle that different nations ought to do each other as much good in peace, and as little harm in war, as possible, without injury to their true interests. 1 Kent's Com. 1, 2; 1 Shars. Bl. Com. 43.

25. How is this law enforced?

It is enforced by the censures of the press, and by the moral influences of those great masters of public law who are consulted by all nations as oracles of wisdom. It is likewise enforced by the sanctions of municipal law. 1 Kent's Com. 181.

26. Of what does the body of international law principally consist?

International law is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relations and conduct of nations ; of a collection of usages, customs and opinions, the growth of civilization and commerce ; and of a code of conventional or positive law. 1 Kent's Com. 3; 1 Shars. Bl. Com. 43.

27. Upon what foundations are all human laws based?

All human laws are based upon two foundations, namely, the law of nature and the law of revelation ; that is to say, no human laws should be suffered to contradict either. With regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the two former. 1 Shars. Bl. Com. 42.

CHAPTER II.

PERSONAL RIGHTS.

1. Into what two classes are the rights of persons divided?

The rights of persons are usually treated by text writers as being either (1) *absolute*, that is, such as belong to men considered merely as individuals, or single persons, or (2) *relative*, or, in other words, such as arise from the civil and domestic relations. 1 Bl. Com. 123; 2 Kent's Com. 1.

2. What phrase does Blackstone use as embracing all the absolute rights of man?

Blackstone treats the absolute rights of persons as being that which in common parlance is known as the natural liberty of mankind. 1 Bl. Com. 125.

3. What is the distinction between natural, and political or civil liberty?

Natural liberty consists in the power of acting as one pleases, subject to no restraint or control beyond that imposed by the laws of nature. Political or civil liberty is natural liberty so far restrained by human laws as is necessary and expedient for the general advantage of the public. 1 Bl. Com. 125.

4. When does the individual surrender his natural liberty, and subject his absolute rights to such restraints or limitations as are consistent with perfect civil liberty?

When he leaves the savage state and enters into society, claiming and receiving the protection of the laws by which it is governed. His right to act as he pleases still remains absolute, except in those particulars wherein the public good requires some direction or restraint. 1 Bl. Com. 125, 126.

5. State generally what you understand to be the absolute rights of individuals.

They are (1) the right of personal security; (2) the right of personal liberty; (3) the right of private property; and (4) the right to the free exercise and enjoyment of religious profession and worship. 1 Bl. Com. 129; 2 Kent's Com. 1, 34.

6. What do you understand by the right of personal security?

The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. 1 Bl. Com. 129.

7. When will a person be justified in taking the life of another?

Homicide is justifiable when necessary for self-defense, or in defense of near relations, or against persons attempting to commit a known felony against one's person, habitation or property. 1 Bl. Com. 130; 2 Kent's Com. 15.

8. Why is the term "natural life" sometimes employed in conveyances of life estates, and what is the origin of the use of the word natural in that connection?

The life of a person may be considered as legally at an end, either when actual death occurs, or when, though living, the law adjudges him dead. The word *natural* was prefixed to the word "life" in conveyances of life estates, to denote that the event upon which the estate was to terminate was the actual death of the grantee, as distinguished from civil death. 1 Bl. Com. 132.

9. Into what two classes does the law separate injuries affecting the reputation of individuals, and what redress does it afford to the party injured?

Injuries to the reputation are divided into two general classes, denominated respectively slander and libel. Slander is regarded as a civil injury merely, for which the law gives compensation in damages, while libel is regarded as a public as well as a private injury, for which the party committing the offense may be punished criminally as well as civilly. 2 Kent's Com. 16-18.

10. What is the difference between libel and slander?

Libel is the malicious defamation of any one, made public by printing, writing, signs or pictures, for the purpose of exposing him to public hatred or ridicule. Slander is a similar defamation by word of mouth. 2 Kent's Com. 16-18.

11. For what words may an action of slander be maintained?

For all words imputing to another the commission of some crime punishable by law, such as treason, murder, forgery, perjury, etc., or for words which may have the effect of excluding him from society, as to charge him with having leprosy, the itch, etc., or words which impair or hurt his trade, as to call a tradesman a bankrupt, a lawyer a knave, or a physician a quack. 2 Kent's Com. 16, note; 3 Steph. Com. 491.

12. What provision is made by the constitution of this State in respect to criminal prosecutions for libels?

The constitution provides that, in all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Const. N. Y., Art. 1, § 8; 2 Kent's Com. 18, 24.

13. How is the liberty of speech and the liberty of the press secured to the people of this country?

By constitutional provisions. The constitution of this State declares that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and both the constitution of this State and the United States prohibit the passage of any law that shall restrain or abridge the liberty of speech or of the press. Const. U. S., Amend., Art. 1; Const. N. Y., Art. 1, § 8; 2 Kent's Com. 17.

14. In what does the right of personal liberty consist?

It consists in the power of locomotion, of changing situation, or moving from place to place at will, without imprisonment or restraint unless by due course of law. 1 Bl. Com. 134.

15. By what instrument was the right of personal liberty first guaranteed to the people of England?

By the *magna charta*, which provides that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. 1 Bl. Com. 134.

16. What protection to personal liberty is extended to the people generally against illegal imprisonment at the hands of those intrusted with the administration of justice?

The protection afforded by the writ of *habeas corpus*, by virtue of which any person illegally restrained of his liberty may compel those having him in custody to take him before the proper court or officer and obtain his discharge, if it shall appear that his commitment was unjust. 1 Bl. Com. 135; 2 Kent's Com. 29-31.

17. In what cases may the privilege of the writ of habeas corpus be suspended?

Only when, in cases of rebellion or invasion, the public safety may require it. Const. U. S., Art. 1, § 9; Const. N. Y., Art. 1, § 4.

18. Who are entitled to prosecute this writ under the laws of this State?

All persons restrained of their liberty under any pretense whatever, unless detained by (1) process from any court or judge of the United States having exclusive jurisdiction of the case, or (2) by final judgment or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction other than in a case of commitment for an alleged contempt. 2 Kent's Com. 29.

19. What was the writ of *ne exeat regno*, at common law, and what is it as employed in this country?

The writ of *ne exeat regno*, as used in England, is a high prerogative writ, by which the king may prohibit a subject from going into foreign parts without license; but in this country the writ is never used for State purposes, and is a mere civil process by which a creditor may compel a debtor, who is about to leave the State, to give security to abide the decree of the court, or in default thereof to be imprisoned until such security is given or decree rendered. 2 Kent's Com. 33, 34.

20. Is the writ of *ne exeat* abolished by section 178 of the Code of Procedure?

It is not. Wait's Code, 341.

21. How is the liberty of conscience secured to the people of this State and of the United States?

By constitutional guarantees. The constitution of the United States provides that "congress shall make no law respecting an establishment of religion," while that of this State declares that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind." Const. U. S., Amend., Art. 1; Const. N. Y., Art. 1, § 3.

22. What limit upon the otherwise absolute liberty of conscience is imposed by the constitution of this State?

The provision, guaranteeing to all mankind the free exercise and enjoyment of religious profession and worship, is qualified by the limitation that the liberty of conscience thereby secured shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace or safety of the State. Const. N. Y., Art. 1, § 3.

23. How is the right of trial by jury guaranteed to citizens of this and other States?

The constitution of this State declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate," while the constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury, and be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense. Also that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Const. N. Y., Art. 1, § 7; Const. U. S., Amend., Art. 6, 7.

24. In what does the right of property consist?

It consists of the right, inherent in every person, to the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. 1 Bl. Com. 138.

25. What general constitutional provisions can you mention which protect the citizen in the enjoyment of life, liberty and property?

The clause in the constitution of this State, and of the United States, providing that no person shall be deprived of life, liberty or property, without due process of law, and also that which provides that private property shall not be taken for public use without just compensation. Const. U. S., Amend., Art. 5, § 14; Const. N. Y., Art. 1, § 6.

26. Does the common law recognize the right of any man or class of men to appropriate the private property of any individual for the convenience of the community at large, without the consent of the owner?

It does not; but where the welfare and convenience of an entire community demand that private property shall be so taken, special statutes or even general statutes may be enacted authorizing such taking, and awarding proper compensation for the property taken. 1 Bl. Com. 139.

27. Is the right of an individual to the control of his property so absolute and exclusive in its nature that it will prohibit the taking of such property without the consent of the owner, and under the authority of general laws, as for the purposes of a private road?

It is not. The power of the legislature to pass laws under which the property of one person could be taken, without the consent of the owner, and used as a private road, even where the owner received compensation in damages, was once questioned by the supreme court; but the question has been for ever placed at rest by the clause in the constitution of this State providing that private roads may be opened in the manner to be prescribed by law, the damages arising therefrom being paid by the party benefited to the party injured. Willard on Real Estate, 197; Const. N. Y., Art. 1, § 7.

28. Are there any cases in which the right to destroy private property may exist, without any corresponding remedy by which the owner can recover compensation in damages from the public or individuals?

There are. The right to destroy property, to prevent the

spread of a conflagration, is an example of this right. 1 Bl. Com. 140, note; 2 Kent's Com. 339, notes; *American Print Works v. Laurens*, 1 Zab. 248.

29. *Would the destruction of property in the case given be justified as an exercise of the right of eminent domain, or as the taking of private property for public use?*

As neither, but as a right existing at common law, founded on the plea of necessity. It is a right which may be exercised by individuals. *American Print Works v. Laurens*, 1 Zab. 248.

30. *In cases of uncommon injury, or infringement upon the absolute rights of individuals, which the law is too defective to reach and redress, what remedy is still left to the people?*

The right to peaceably assemble, and to petition the government for a redress of their grievances. 1 Bl. Com. 143; Const. U. S., Amend., Art. 1; Const. N. Y., Art. 1, § 10.

31. *Can any constitutional law be passed which shall prohibit the carrying of arms for the purpose of self-defense.*

It can, notwithstanding that the constitution provides that the right to keep and bear arms shall not be infringed. Const. U. S., Amend., Art. 2.

32. *Can a State deny to any person within its jurisdiction the equal protection of its laws?*

It cannot. The right of every person to the protection of the laws of the State in which he may chance to be is absolute. Const. U. S., Amend., Art. 14, § 1.

33. *Can a citizen of the United States be denied any personal right on the ground that it is not expressly secured to him as a constitutional privilege?*

No. The enumeration in the constitution of certain rights cannot be construed to deny or disparage others retained by the people. Const. U. S., Amend., Art. 9.

34. *Can a State make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States?*

It cannot. Const. U. S., Amend., Art. 14, § 1.

CHAPTER III.

DOMESTIC RELATIONS.

1. *What is marriage?*

Marriage is a contract according to the form prescribed by law, by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife. Tyler on Inf. & Cov., § 619 ; Shelf. Mar. & Div. 1 ; Reeve's Dom. Rel. 307.

2. *When is marriage complete?*

Marriage is complete when there is a full, free and mutual consent by parties contracting, although not followed by cohabitation. Reeve's Dom. Rel. 307, note ; 1 Wait's Law & Pr. 654 ; Tyler on Inf. & Cov., § 631.

3. *Is it necessary, to constitute a valid marriage, that it should be solemnized by any particular form or ceremony?*

It is not. No ceremony or solemnization by minister, priest or magistrate is necessary to give validity to a marriage. 1 Wait's Law & Pr. 654 ; Tyler on Inf. & Cov., § 631 ; Reeve's Dom. Rel. 310, note.

4. *At what age are the parties legally capable of contracting and consummating a marriage?*

At common law, males at the age of fourteen and females at the age of twelve are capable of contracting and consummating a marriage ; and this common-law rule now prevails in this State. Tyler on Inf. & Cov., §§ 81, 82 ; 1 Wait's Law & Pr. 655 ; Reeve's Dom. Rel. 313, note.

5. *What would be the effect of the solemnization of a marriage between parties ^{under} ~~within~~ the age of consent?*

The marriage will be void from the time its nullity shall be declared by a court of competent authority ; but the marriage will in no case be annulled on the application of a party who was of legal age at the time it was contracted, nor where it appears that the parties, after attaining the age of consent,

had for any time freely cohabited as husband and wife. Tyler on Inf. & Cov., § 82.

6. What was the effect of marriage, at common law, on the wife's property, in things personal?

At common law, by the fact of marriage, the husband became legally entitled to all the personal estate which the wife had at the time of marriage, and to all which might come to her thereafter during the coverture. The law vested it in him by virtue simply of his marital relations. Tyler on Inf. & Cov., § 234; Reeve's Dom. Rel. 49; 2 Bl. Com. 433.

7. What was the effect of marriage, at common law, on the wife's property, in things real?

At common law, the husband acquired, by marriage, the usufruct of all the freehold estate of his wife, consisting of all her lands, tenements and hereditaments which she had in fee simple, fee tail, or for life. Reeve's Dom. Rel. 86; Tyler on Inf. & Cov., § 260.

8. What was the effect of the statutes of 1848 and 1849, commonly called the Married Woman's Acts?

The statutes of 1848 and 1849 entirely abrogated the common-law rule as to the effect of marriage, and substituted a new and entirely different rule. By those statutes the property of the wife, both real and personal, was declared no longer subject to the control or disposal of her husband in any respect; and the wife was empowered to retain it as her sole and separate property, the same as though she were a single female, and to dispose of it by gift, sale or bequest, independent wholly of her husband. Tyler on Inf. & Cov., §§ 451, 463; Reeve's Dom. Rel. 50; Laws of 1848, ch. 200; Laws of 1849, ch. 375; 1 Wait's Law & Pr. 658.

9. What was the common law, and what is the present rule respecting the validity of a gift from the husband to the wife?

It was a rule of the common law that a gift from the husband to the wife would not vest the property, in the thing given, in the wife. This rule was recognized by the acts of

1849 and 1860, but was impliedly abrogated by the act of 1862. A wife may now acquire property by gift from her husband, and may maintain an action to recover it from any person removing it from her possession. Laws of 1862, ch. 172; Tyler on Inf. & Cov., § 470.

10. Would a gift from the wife to the husband be equally valid under existing statutes?

It would not. The gift would be void for want of sufficient consideration to sustain it. *Hunt v. Johnson*, 44 N. Y. (5 Hand) 27; 1 Wait's Law & Pr. 661.

11. What was the common law, and what is the present statutory rule, in respect to the earnings of a married woman?

At common law, the earnings of the wife belonged absolutely to the husband, and a promise to pay the wife therefor was construed as a promise to pay her husband. But, by the act of 1860, a married woman is authorized to carry on any trade or business, and perform any labor or services on her sole and separate account, and to hold the earnings resulting therefrom as her sole and separate property. Laws of 1860, ch. 90, § 2; Reeve's Dom. Rel. 50; Tyler on Inf. & Cov., §§ 353, 455; Wait's Code, 128 (d).

12. What was the rule, at common law, as to the disposition of the personal estate of a married woman who died leaving no will?

At common law, and under the Revised Statutes, the husband, on the decease of the wife, took in his own right all her personal estate as a matter of law. The separate estates of married women were excepted from the general operation of the statute of distributions. Tyler on Inf. & Cov., § 459; 2 R. S. 98, § 79.

13. What effect had the statutes of 1848 and 1849 on this rule?

None whatever. The statutes of 1848 and 1849 affect such property only as the wife may dispose of in her life-time or by will. Tyler on Inf. & Cov., § 459.

14. *If A., being a married woman, and possessed of a separate estate, dies intestate, leaving a husband, brothers, sisters and other relatives surviving, but no descendants, what portion of her personal estate will the husband be entitled to take under existing statutes?*

The husband is entitled to the entire personal estate of his wife, where she dies intestate, leaving no descendants. The right formerly given him under the common law and Revised Statutes, to inherit the entire personal estate of the wife, in such cases, was not taken away by the act of 1867. Laws of 1867, ch. 782, §§ 11, 12; *Barnes v. Underwood*, 47 N. Y. (2 Sick.) 351.

15. *To what portion of her personal estate would he have been entitled had she died intestate, leaving descendants?*

In that case the husband would be entitled to one-third of the wife's personal estate. Laws of 1867, ch. 782; *Barnes v. Underwood*, 47 N. Y. (2 Sick.) 351.

16. *If a married woman, carrying on a separate business, performs labor and services, at the request of her husband, for the firm of which he is a member, can she maintain an action against the firm, including her husband, for the value of such services?*

She can. *Adams v. Curtis*, 4 Lans. 164.

17. *If a female mortgagee marries the mortgagor, will such marriage extinguish her right of action upon the mortgage?*

It will not, as the common-law rule to that effect has been repealed, and, under existing laws, a wife may maintain an action in her own name concerning her separate estate, against her husband or any other person. Wait's Code, 127; Tyler on Inf. & Cov., § 463.

18. *Under what statute and upon what principle may a married woman maintain an action in her own name to recover damages for injuries to her person or character?*

Under the act of 1860, as amended by the act of 1862, and upon the principle that assaults and batteries and slanders are made a part of the separate estate of the wife, by the clause

providing that the money received, upon the settlement of any such action or recovered upon a judgment, shall be her sole and separate property. Laws of 1862, ch. 172, § 3; Tyler on Inf. & Cov., § 469; Wait's Code, 128; Reeve's Dom. Rel. 19.

19. Does this statute authorize the wife to maintain an action against her husband to recover damages for an assault and battery or for slander?

The language of the statute is general and does not in terms prohibit the wife from maintaining such action; but the courts have denied the application of this statute to actions so brought, as contrary to the spirit and intent of the statute and the policy of the law. Tyler on Inf. & Cov., § 475; Wait's Code, 129.

20. What changes have been made by recent statutes respecting the liability of the husband for contracts of the wife made before marriage?

The common-law liability of the husband for debts contracted by the wife before marriage was, by the act of 1853, limited to the amount of property acquired by him by marriage or by an ante-nuptial contract; and by this act, and the acts giving the wife a separate estate, this liability was in effect restricted to property acquired through the wife by ante-nuptial contract. Reeve's Dom. Rel. 20, 144; Tyler on Inf. & Cov., § 220; Laws of 1862, ch. 172; Laws of 1853, ch. 576.

21. State briefly the common-law liability of the husband for the torts of the wife?

The husband was jointly liable with his wife during coverture for all torts committed by her before marriage; he was solely liable for all torts committed by her in his presence or at his request during coverture; and jointly liable with her for all torts not committed in his presence or by his request. Reeve's Dom. Rel. 148; Tyler on Inf. & Cov., § 233; 1 Wait's Law & Pr. 667.

22. What has been the effect of the married woman acts upon this rule?

The common-law rule has been so far changed as to exempt the husband from liability for such torts of his wife as

grow out of the management of her separate estate, and to render her liable instead. *Peak v. Lemon*, 1 Lans. 295. But the husband is still liable for the strictly personal torts of his wife. *Rowe v. Smith*, 45 N. Y. (6 Hand) 230.

23. State the common-law rule as to the liability of the husband for necessaries furnished to the wife during coverture?

The husband is bound, by his wife's contracts, for necessities for herself when he has refused or neglected to provide them. This liability is not based upon the consent of the husband, whether express or implied, but on the duty devolving upon him to provide necessities for his wife. This duty the law will enforce. Reeve's Dom. Rel. 160.

24. When does this liability cease?

It ceases when the wife departs from her husband, without cause, and refuses to cohabit with him. Reeve's Dom. Rel. 161; Tyler on Inf. & Cov., § 228; 1 Wait's Law & Pr. 666.

25. Can a married woman enter into any contract in respect to her separate estate, or in respect to any business carried on by her under any statute of this State, which will be binding upon her husband, or which will render him liable in person or property?

She cannot. This is expressly provided by the act of 1860, as amended in 1862. See Reeve's Dom. Rel. 20.

26. A wife carries on a mercantile business in her own name, and with her own capital, but through her husband as agent, for whose support she applies an indefinite portion of her income. Will the husband or his creditors acquire an interest in the separate estate of the wife, by reason of the voluntary services of the husband as managing agent?

They will not. A married woman may, under existing statutes, manage her separate property through the agency of her husband, without impairing her title thereto and without subjecting it to the claims of her husband's creditors. Tyler on Inf. & Cov., § 458.

27. A married woman, having a separate estate, indorses her husband's promissory note as surety, without consideration and without benefit to her separate estate, but expresses, by the indorsement, that, for value received, she charges her individual property with the payment of the note. On default of the husband, can the amount of the note be collected from the separate estate of the wife?

It can. It is not necessary, in order to make such indorsement a charge upon her separate estate, that it should specify the property charged. It is sufficient if it shows the intent of the wife that her estate shall be so charged. *Corn Exchange Insurance Co. v. Babcock*, 42 N. Y. (3 Hand) 613.

28. What provision is made by statute in respect to enforcing a judgment recovered against a married woman?

It is provided that, whenever a judgment shall be recovered against a married woman, the same may be enforced against her sole and separate estate, in the same manner as if she were sole. Laws of 1862, ch. 172, § 7; Reeve's Dom. Rel. 20.

29. Is the husband a proper party to an action relating to the sole and separate property of the wife?

He is not. Wait's Code, 128, note (d).

30. To what estate does the wife become entitled upon the death of her husband?

By the death of the husband, the wife becomes entitled, during her life, to one-third part of the real estate of inheritance of which the husband was seized during the coverture. This estate is termed dower. Reeve's Dom. Rel. 102; Tyler on Inf. & Cov., § 377.

31. Can the husband, by will, deprive the wife of her dower?

He cannot. The only mode by which the husband can deprive his wife of dower is by inducing her to join with him in the execution of the instrument by which he conveys the estate to which her right of dower attaches. Reeve's Dom. Rel. 103.

32. State the different kinds of divorce recognized in this State?

There are two kinds or degrees of divorce recognized in this State: (1) An absolute divorce from the bonds of matrimony, or a divorce *a vinculo matrimonii*; and (2) a divorce from bed and board, or a divorce *a mensa et thoro*. Tyler on Inf. & Cov., § 671.

33. State the distinction, as to the effect of the respective decrees of divorce, upon the relations of the parties.

The absolute divorce is a complete dissolution of the bond of matrimony, and puts an end to the marriage relation, while the divorce from bed and board, or, as it is often called, a limited divorce, does not put an end to the marriage contract, but is a mere judicial separation of the parties. Tyler on Inf. & Cov., § 671.

34. What is the distinction between a decree of divorce and a decree of nullity?

Divorce, in the strict sense of the term, is a dissolution of the matrimonial relation for causes occurring subsequent to a valid marriage, while a decree of nullity is rendered only in those cases in which the marriage was void *ab initio*, for causes existing at the time of marriage, and simply declares that a nullity which was absolutely void before. Tyler on Inf. & Cov., §§ 654, 659.

35. In what cases are separations from bed and board authorized by the laws of this State?

(1) In case of cruel and inhuman treatment of the wife by the husband; or (2) in case of such conduct on his part as may render it unsafe for her to cohabit with him; or (3) in case of abandonment of the wife by the husband. Wait's Code, 873, note (d).

36. If parties enter into the marriage relation who have not the legal capacity to make a valid contract, as idiots and lunatics, is it necessary to obtain a decree of the court declaring such marriage void, or is such decree unnecessary?

At common law, such marriage is absolutely void, and no

decree of avoidance is necessary; but by the statute of this State, where either party to a marriage are incapable of contracting it, the marriage will be void only from the time its nullity is declared by a court of equity. Tyler on Inf. & Cov., § 635.

37. Who are infants?

All persons, male or female, under the age of twenty-one years, are infants. Reeve's Dom. Rel. 344.

38. What peculiar privilege does the law give to infants for their protection?

The privilege of rescinding their contracts at pleasure. Reeve's Dom. Rel. 344.

39. What exception is there to the general rule that an infant is not bound by his contracts?

An infant is bound by his contracts for such food, drink, washing, clothing, medical attendance and instruction as, strictly speaking, are necessary for his support and are suitable to his condition in life. But this liability ceases when the articles furnished under the contract cease to be *necessaries*, as where the infant lives with a parent, master or guardian, who is ready and willing to supply them. Reeve's Dom. Rel. 344; 1 Wait's Law & Pr. 894.

40. If an infant, in want of necessary clothing, should purchase cloth for a coat, proper for him in all respects, the ordinary price of which was two dollars per yard, would he be held liable on his contract to pay therefor the sum of four dollars per yard?

He would not be held liable to the extent of his contract, but only for value of the goods furnished, under the general rule that an infant is never liable on the footing of any *express* contract, but is liable only on the *implied* contract arising from his having been furnished with necessities, the amount of damages in every case being regulated by the equity of the case. Reeve's Dom. Rel. 347.

41. Does the common-law rule, allowing an infant at the age of seventeen to act as executor, prevail in this State?

It does not. The Revised Statutes declare an infant incapable of acting either as executor or administrator. Reeve's Dom. Rel. 355, note.

42. At what age may an infant dispose of personal property by will?

The statute fixes the age at which an infant may dispose of personal property by will, at eighteen in males and sixteen in females. Reeve's Dom. Rel. 358, note; Tyler on Inf. & Cov., § 7.

43. If an infant enters into a contract to pay a stipulated sum for goods furnished, which are not regarded in law as necessaries, and, after coming of age, promises to pay the vendor for the goods, will he be held liable for the price fixed by the contract, or only for the value of the goods?

He will be liable only for the actual value of the goods, and not for the contract price, if that price exceeds the actual value of the goods at the time of sale. The liability arises on the new contract, and not on the original agreement. Tyler on Inf. & Cov., § 46; Reeve's Dom. Rel. 360.

44. Will a bare acknowledgment of liability be construed as a ratification of an executory agreement made during infancy?

It will not. In order to ratify such a contract, there must be not only an acknowledgment of liability, but an express promise, voluntarily made by the infant upon his arriving at the age of maturity, and with the knowledge that he is not legally liable, or some act which is a legal equivalent of an express promise. Story on Cont., § 69; Tyler on Inf. & Cov., §§ 46, 55.

45. If A, during infancy, leases certain real estate, what will be the effect of receiving rent after he becomes an adult?

The act of receiving rent will be considered as the legal equivalent of an express promise that the lease shall stand, and the infant will be bound thereby. Reeve's Dom. Rel. 362.

46. If an infant and an adult respectively agree to marry, is the promise mutually binding ?

It is not. It is binding upon the adult, while the infant may rescind the contract. Reeve's Dom. Rel. 365.

47. If an infant executes a mortgage to secure the purchase-money of goods, upon what condition may he affirm or disaffirm the mortgage, after becoming of full age ?

If he affirms the mortgage, he must pay the amount or deliver the goods, according to its terms; but if he disaffirms it, he must restore the goods or account for their value. He cannot affirm the sale and at the same time repudiate the mortgage. Reeve's Dom. Rel. 370, note.

48. State the general rule as to the liability of infants for their torts.

Infancy is no defense in an action strictly *ex delicto*, but is a good defense in an action *ex contractu*. If the act constituting the cause of action is wholly tortious, the infant is liable; but, if the act complained of is a mere breach of contract, the infant will not be liable, although the action is in form *ex delicto*, and the acts of the infant tainted with fraud. Reeve's Dom. Rel. 386, note; Tyler on Inf. & Cov., §§ 123, 124.

49. If A, being a minor, hires a horse of B to go a certain distance or to a certain place, but goes a greater distance, or to another place in another direction, is he liable to B in an action for damages ?

He is. The act of the infant, in that case, is a dispossession of the owner and a conversion of the horse; and the action for damages will be founded, not upon a breach of the contract of hiring, but upon the unlawful conversion; and to this action the plea of infancy will be no defense. Tyler on Inf. and Cov., § 125; 1 Wait's Law & Pr. 892.

50. Can a parent discharge himself from his obligation to support his child by showing that the child is able to support himself ?

If the child is an infant he cannot, but if the child is an adult he may. Reeve's Dom. Rel. 413.

51. If a person of the age of twenty-one years or over is a pauper, and is, from physical causes, unable to maintain himself, is he legally entitled to support from his parents?

He is, if his parents are of sufficient ability. The parents can free themselves from this liability by showing either their inability to support the child, or his ability to support himself. Reeve's Dom. Rel. 414.

52. What provision is made by statute for the support of poor persons who are blind, old, lame, impotent or decrepit, so as to be unable to work to maintain themselves?

The statute provides that the father, mother and children of any such person, who are of sufficient ability, shall, at their own charge, relieve and maintain such poor person in such manner as shall be approved by the overseers of the poor of the town where such poor person may be. Reeve's Dom. Rel. 415, note; 1 Wait's Law & Pr. 668.

53. In what order will the father, mother or children of such poor person be liable for his support?

The father is primarily liable; but if he is dead, or unable to support the pauper child, then the children of the pauper are liable; but, if there are no children, or they be not of sufficient ability, then the mother is liable. Reeve's Dom. Rel. 415, note.

54. Does the common law make it the duty of a child to support an infirm and indigent parent?

It does not. The obligation is created solely by statute. Reeve's Dom. Rel. 415, note. *Blae & Cone J. 453§3*

55. Is a husband liable for the support of a child of his wife by a former husband, and is he entitled to the services of such child?

He is not; but, if he takes such child into his family, he assumes the duties and liabilities of a parent so long as he retains the child in his family. Reeve's Dom. Rel. 416, note; 1 Wait's Law & Pr. 670, 673.

56. What is the general rule as to the disposition of the earnings of an infant child?

As a general rule, the earnings of an infant belong to the parent, who may sue for them in his own name. 1 Wait's Law & Pr. 672 ; Reeve's Dom. Rel. 422.

57. If A employs a minor by the year to do a certain kind of work, and, at the expiration of the year, pays the amount of wages agreed upon directly to the minor, can A set up such payment as a defense to an action, brought by the parent of the infant, for the recovery of such earnings?

He can, unless notice had been given him by the parent of the infant, within thirty days from the commencement of the services, that he claims the earnings of the infant. 1 Wait's Law & Pr. 673 ; Laws of 1850, ch. 266.

58. What statutory limitation is placed upon the right of a father to transfer the control of his infant child to another?

It is provided by statute that no man shall bind his child to apprenticeship or service, or part with the control of such child, or create any testamentary guardian therefor, unless the mother, if living, shall, in writing, signify her assent thereto. Laws of 1862, ch. 172, § 6 ; 1 Wait's Law & Pr. 661, 672.

59. Upon what theory only may a father maintain an action for an injury done to his infant child?

Upon the theory that the father has himself sustained damage thereby, as in the loss of the services of the child, or otherwise. 1 Wait's Law & Pr. 674 ; Reeve's Dom. Rel. 423.

60. Is the amount of damages recoverable by a father, for the seduction of his daughter, measured by the actual value of the services lost by him in consequence of such seduction?

It is not. The right of action by the father is, by a legal fiction, made to rest on a supposed loss of services arising from the seduction ; but the real ground of action is the injury to the person seduced, and this forms the true measure of damages. Reeve's Dom. Rel. 425.

61. Define the terms "guardian" and "ward."

A guardian is one who has the legal custody of the person or estate of an infant, or both ; and the person who is under the care of a guardian is called a ward. Reeve's Dom. Rel. 449 ; Tyler on Inf. & Cov. 237.

62. Who are "testamentary" guardians?

A testamentary guardian is one appointed by the last will and testament of the father or mother of the child. Tyler on Inf. & Cov., § 170.

63. To whom does the guardianship of an infant, vested with an estate in land, belong under the laws of this State?

The guardianship of such infant belongs (1) to the father of the infant ; or, if the father be dead, (2) to the mother ; or, if both father and mother are dead, (3) to the nearest and eldest relative, of full age, not being under any legal incapacity. Tyler on Inf. & Cov., § 169 ; Willard on Ex. & Surr. 444.

64. Can a father appoint a testamentary guardian of a married infant?

He cannot. Tyler on Inf. & Cov., § 170 ; Willard on Ex. & Surr. 446.

65. In whom is vested the power of appointing general guardians, under the statutes of this State?

In the supreme court and in the surrogates of the several counties. Tyler on Inf. & Cov., § 171.

66. What distinction is made by law as to the powers of the surrogate and of the supreme court in the matter of the appointment of guardians?

The supreme court can appoint a guardian for an infant over fourteen years of age, without the consent and against the nomination of the infant, while the surrogate cannot ; the supreme court can appoint a guardian for an infant whose father is living, while the surrogate cannot ; and the guardian appointed by the supreme court continues until the majority of the infant, while the guardian appointed by the surrogate

may be removed, if the infant, on becoming fourteen years of age, chooses a different person, and his choice is allowed by the surrogate. Willard on Ex. & Surr. 447 ; Tyler on Inf. & Cov., § 173.

67. What are the general duties of a guardian ?

The statute declares that the guardian shall safely keep the things he may have in his custody, belonging to his ward, and not make or suffer any waste, sale or destruction of such inheritance, but shall keep up and sustain the houses, gardens and other appurtenances of his ward by and with the issues and profits thereof, and with such other moneys belonging to his ward as shall be in his hands, and shall deliver the same to his ward, when he comes to his full age, in as good order and condition, at least, as such guardian received the same, inevitable decay and injury only excepted ; and he shall answer to his ward, for the issues and profits of real estate received by him, by a lawful account. Willard on Ex. & Surr. 448 ; Tyler on Inf. & Cov., § 174.

68. What peculiar right is given to a ward on becoming of age in respect to real estate, purchased by the guardian with the funds of his ward ?

If a guardian exceeds his powers, and converts the personal property of his ward into real estate, or buys land with his ward's money, such ward may, on coming of age, take the land, or the money with interest. Willard on Ex. and Surr. 449 ; Tyler on Inf. and Cov., § 175 ; Reeve's Dom. Rel. 468.

69. In what manner would you proceed to secure the appointment of a general guardian by the supreme court ?

I would present a petition to the court, subscribed by the infant, if of the age of fourteen years or upward, or, if otherwise, by some relative or friend, stating the age and residence of the infant, the name, residence and relationship of the proposed guardian, and the nature, situation and value of the infant's estate. Rule 64, Sup. Ct. ; Wait's Code, 855.

70. What security is required of a general guardian ?

The amount and character of the security required de-

pends in a great measure upon the discretion of the court. It should be in the form of a bond, in a penalty of double the amount of the personal estate of the ward, and of the gross amount or value of the rents or profits of the real estate during his minority. This bond may be signed by two sureties, or the guardian may give instead, security by way of mortgage on unincumbered real estate, of the value of the penalty of the bond. Rule 66, Sup. Ct.; Wait's Code, 856.

71. Where one person employs another to do certain work, and no express agreement is made as to the amount of compensation, how will the question of compensation be determined?

In the absence of an express agreement as to the amount of compensation, the law will imply or promise, by the employer, to pay what the services are reasonably worth. 1 Wait's Law and Pr. 680.

72. If A agrees to work for B for six months, for sixty dollars, but ceases to work at the expiration of two months, on account of securing a more lucrative position elsewhere, can he recover from B the value of his services for two months, at ten dollars per month?

He cannot. It would be otherwise if he had been prevented from fulfilling his contract by sickness or inevitable accident. Reeve's Dom. Rel. 493, note; 1 Wait's Law & Pr. 176.

73. Would the rights of the parties have been changed if A had been an infant?

They would. In that case the infant could recover the value of the services rendered, without regard to the express contract. 1 Wait's Law & Pr. 183.

74. What remedies are available to a contractor whose contract to do certain work at a stipulated price has been terminated by his employer against his will?

He may bring an action to recover the contract price for the work done; or, he may bring an action for a breach of the agreement, and recover, as damages, the profits he would

have made if allowed to complete the work ; or, he may waive the contract, and bring his action for work and labor generally, and recover what the work was actually worth. 1 Wait's Law & Pr. 185.

75. What is the general rule as to the liability of a master for the acts of his servant?

As a general rule, a master will be liable for the torts of his servant, where the tortious acts are done in the immediate pursuit of the master's business. Reeve's Dom. Rel. 508.

76. A, the servant of B, while employed in driving a dray for his master, conceives that C is unnecessarily obstructing his way, and thereupon leaves his dray standing in the road and assaults C; C thereupon brings an action against B for the damages arising from the wrongful act of his servant, A; can he recover?

He cannot, upon the principle that, when a servant loses sight of the object for which he was employed, and without having in view his master's orders, pursues that course which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will be no longer answerable for such act. Reeve's Dom. Rel. 518, 521.

77. Upon what principle does the liability of a master depend, for injuries arising from the carelessness, negligence or want of skill of his servant?

Upon the principle that it is a duty which a master owes to himself and others, that he shall employ careful servants. Reeve's Dom. Rel. 509, 517.

78. A railroad corporation, after having for a long time had in their employ a switchman, who was careful and trusty in his general character, employed an engineer to run a train of cars upon their road, who knew of the character and employment of the switchman. The engineer was subsequently injured by an accident arising from the carelessness of the switchman in leaving a misplaced switch; can the engineer recover the damages so sustained in an action against the railroad corporation?

He cannot. No action can be sustained against the master

of a servant, for an injury received in the course of the service from the negligence of a fellow servant, where such injury occurs without any fault or misconduct on the part of the master. Reeve's Dom. Rel. 509, 516, note.

79. What would have been the rule if the engineer had been in the employ of another corporation, entitled to use the track of the corporation employing the switchman, and the accident had occurred as above stated?

The engineer could recover damages of the corporation owning the track for the injury caused by the negligence of their servant. Reeve's Dom. Rel. 510, note.

80. If a municipal corporation, through its officers, enter into a contract to have certain work done, and to pay for the same on its completion in a specified manner, will the corporation be liable for damages caused by the negligence of the workmen employed by the contractor in performing the work?

It will not, for the reason that the relation of master and servant does not exist between the corporation and the workmen employed by the contractor. Reeve's Dom. Rel. 511, note.

81. Upon what theory or for what reason would you decide that the relation of master and servant did not exist in the case above given between the corporation paying for, and the laborer performing, the work?

Upon the theory that the corporation had power to direct as to the result of the work merely, but not as to the manner of its performance; and that the power to direct the mode of doing any particular act is essential to the relation of master and servant. Reeve's Dom. Rel. 511, note.

CHAPTER IV.

CORPORATIONS.

1. What is a corporation?

A corporation is a body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person. Angell and Ames on Corp. Int., § 1; 2 Kent's Com. 266.

2. State the object and use of corporations.

The object in creating a corporation is to gain the union, contribution and assistance of several persons for the successful promotion of some design of general utility, though the corporation may, at the same time, be established for the advantage of those who are members of it. Much of the most important business which requires an extensive capital is done by corporations. Angell and Ames on Corp. Int., § 13; 1 Wait's Law and Pr. 259.

3. Give some instances of the purposes for which corporations are formed?

Some of the more frequent instances are those which relate to banking, life, marine and fire insurance, steamboats, steamships, railroads, plank-roads, turnpikes, bridges, canals, literary societies, trading companies, gaslight and telegraph associations, and others of a similar character. 1 Wait's Law and Pr. 259.

4. To whom belongs the honor of originating corporate bodies?

The honor of the invention is, by Sir William Blackstone, given to the Romans, and corporations were certainly well known to the Roman law and existed from the earliest periods of the Roman republic; but, it appears, they were borrowed from the laws of Solon, who permitted private companies to institute themselves at pleasure, provided they did nothing

contrary to the public law. 2 Kent's Com. 268; 1 Shars. Bl. Com. 468.

5. From whence did the English law derive the principles of law applicable to corporations?

It is evident they were borrowed chiefly from the Roman law, and from the policy of the municipal corporations established in Britain and the other Roman colonies, after the countries had been conquered by the Roman arms. Corporations for the advancement of learning were, however, entirely unknown to the ancients, and they are the fruits of modern invention. The first appearance in any public document of the terms *corporation* and *body corporate*, was in the reign of King Henry IV. The first charter of incorporation to a municipal body was granted under Henry VI. 2 Kent's Com. 271; Angell and Ames on Corp., §§ 48, 50.

6. How are corporations divided?

The first division of corporations is into *aggregate* and *sole*. Another division, by the English law, is into *ecclesiastical* and *lay*. Lay corporations are again divided into *eleemosynary* and *civil*, and civil corporations are either *public* or *private*. 1 Shars. Bl. Com. 469; 2 Kent's Com. 274, 275.

7. What does a corporation sole consist of?

A corporation *sole* consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he could not have. A bishop, dean, parson and vicar are given as instances, in the English books, of sole corporations. 2 Kent's Com. 273.

8. What is a corporation aggregate?

A corporation aggregate is a collection of individuals united in a body under such a grant of privileges as secures a succession of members without changing the identity of the body. 1 Wait's Law & Pr. 260.

9. What are ecclesiastical corporations?

They are such as are composed of members who take a

lively interest in the advancement of religion, and who are associated and incorporated for that object. They may be either sole or aggregate. With us they are called religious corporations. 2 Kent's Com. 274; Angell and Ames on Corp., § 36.

10. For what purpose are eleemosynary corporations constituted?

They are private charities, constituted for the perpetual distribution of the alms and bounty of the founders. In this class are ranked hospitals for the relief of poor, sick and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations. 2 Kent's Com. 274; 1 Shars. Bl. Com. 471.

11. For what purposes are public corporations created?

They are created by the government, for political purposes, as counties, towns, villages and cities. They are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the State. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are all created for the public benefit. 2 Kent's Com. 275; 1 Shars. Bl. Com. 469 *n.*

12. What do private corporations include?

They properly include all not embraced under *public* corporations, as religious, literary, charitable, manufacturing, insuring or money-lending associations, as well as railway, canal, bridge, turnpike companies, etc. 1 Shars. Bl. Com. 469; 1 Wait's Law & Pr. 261.

13. What is the main distinction between public and private corporations?

The legislature, as the trustee or guardian of the public interests, has the exclusive and unrestrained control over the former; and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interest will be best subserved. Private corporations,

on the other hand, are created by an act of the legislature, which, in connection with its acceptance, is regarded as a *compact*, and one which, so long as the body corporate faithfully observes, the legislature is constitutionally restrained from impairing, by annexing new terms and conditions, onerous in their operation, or inconsistent with a reasonable construction of the compact. Angell and Ames on Corp., § 31; 2 Kent's Com. 275.

14. *By whom are corporations created?*

In England they are created and exist by prescription, by royal charter, and by act of parliament. In this country they are created in no way, but by authority of the legislature. No particular form of words is requisite to create a corporation. 2 Kent's Com. 276; 1 Shars. Bl. Com. 472.

15. *Is it necessary for a corporation to have a name?*

It is; for without a name it could not perform its corporate functions; and a name is so indispensable a part of the constitution of a corporation, that if none be expressly given, one may be assumed by implication. 2 Kent's Com. 292; Angell and Ames on Corp., § 90; 1 Shars. Bl. Com. 474, 475.

16. *What are the powers incidental to every corporation?*

Writers on the subject enumerate the following: 1. To have perpetual succession, and, of course, the power of electing members in the room of those removed by death or otherwise; 2. To sue and be sued, and to grant and to receive by their corporate name; 3. To purchase and hold lands and chattels; 4. To have a common seal; 5. To make by-laws for the government of the corporation; 6. The power of amotion, or removal of members. 1 Kyd. on Corp. 69, 70; 2 Kent's Com. 78; 1 Shars. Bl. Com. 475; Angell and Ames on Corp., § 110.

17. *What are quasi corporations?*

There are some persons and associations who have a corporate capacity only for particular specified ends, but who can in that capacity sue and be sued as an artificial person. These bodies are termed *quasi* corporations. Each county,

and the supervisors of a county, each town, and trustees of school districts, commissioners of highways and overseers of the poor, may be given as instances. 2 Kent's Com. 279 ; 1 Shars. Bl. Com. 469 ; 1 Wait's Law & Pr. 260.

18. When a corporation is said to be a person, in what sense is the expression to be understood ?

It is to be understood in a limited sense, for a corporation is strictly a *political* institution, and can be understood to be a person only in certain respects, and for certain purposes. It cannot be deemed a moral agent, and, therefore, it cannot commit a crime or become the subject of punishment, or take an oath, or appear in person, or be arrested or outlawed. 2 Kent's Com. 279 ; 1 Shars. Bl. Com. 477.

19. In what way has it been demonstrated that corporations have no souls ?

It is reported by Lord Coke, that Chief Baron Manwood demonstrated it, in the following manner : "None can create souls but God ; but a corporation is created by the king ; therefore, a corporation can have no soul." It is in this view that a corporation cannot be guilty of a crime, as treason or felony. 1 Kyd. 71 ; 2 Bulst. 233.

20. What is meant by the immortality of a corporation ?

The immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists ; and so far is it from being literally true that a corporation is immortal, that many corporations of recent creation are limited in their duration to a certain number of years. When it is said, therefore, that a corporation is immortal, it must be understood *theoretically* ; that is, that it *may* exist for an indefinite duration. Angell & Ames on Corp., § 8 ; 2 Kent's Com. 267.

21. Are corporations deemed competent to perform the duties of trustees ?

They are ; and are also regarded as proper and safe depositories of trusts. And among the almost infinite variety of purposes for which corporations are created at the present

day, we find them authorized to receive and take by deed or devise, in their corporate capacity, any property, real and personal, in trust, and to assume and execute any trust so created and declared. 2 Kent's Com. 280; Angell & Ames on Corp., § 168.

22. What rights have corporations as to taking, holding and transmitting property?

Every corporation aggregate, in order that it may be enabled to answer the purposes of its creation, has, incidentally at common law, a right to take, hold and transmit in succession, property, real and personal, to an unlimited extent or amount. Thus, a grant of lands from the sovereign authority to the inhabitants of a county, town, or hundred, rendering rent, would create them a corporation for that single intent, or confer upon them a capacity to take and hold the lands in a corporate character, without saving to them and their successors. 2 Kent's Com. 281; Angell & Ames on Corp., § 145.

23. How do corporations make contracts?

There are two general modes in which they may expressly contract, first by vote, and secondly by their duly authorized agents. On account of the inconvenience of the former mode, the latter is usually adopted. 2 Kent's Com. 289; Angell & Ames on Corp., §§ 228, 231.

24. Can a corporation have a legal existence out of the sovereignty by which it is created?

It cannot; for the reason that it exists only in contemplation of law, and by force of law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. Its residence in one State creates, however, no insuperable objection to its power of contracting in another. Angell & Ames on Corp., § 161.

25. To what extent are corporations bound by the acts of their agents?

Corporations, like natural persons, are bound only by the acts and contracts of their agents, done and made within the

scope of their authority. It is the settled doctrine that corporations can now be bound by contracts made by their agents, within the scope of their authority, though the same be not under seal. 2 Kent's Com. 291; Angell & Ames on Corp., § 292.

26. How do corporations appoint their agents?

They may be appointed under the corporate seal or by resolution or vote; and either of these modes will be legal, even though the agent be appointed to convey the real estate of the corporation, or whatever may be the purpose of the agency. Angell & Ames on Corp., § 283.

27. When the agent of a corporation desires to bind the corporation only, by a contract he makes in its behalf, what is the proper mode to be adopted?

His proper mode is to name the corporation, in the body of the contract, as the contracting party, and to sign as its agent or officer; and this is the mode in which bank bills and policies of insurance are ordinarily executed. Angell & Ames on Corp., § 293.

28. May a contract of a corporation be implied from the acts of the corporation?

It may, or such contract may be implied from the acts of their authorized agents; and, in general, if a person, not duly authorized, makes a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent. 1 Pars. on Cont. 118; Angell & Ames on Corp., § 304; 1 Wait's Law & Pr. 270.

29. What is necessary in order to bind a corporation by specialty?

It is necessary that its corporate seal should be affixed to the instrument. The corporate seal is the only organ by which a body politic can bind itself by deed; and, though its agents affix their private seals to a contract binding upon it, yet these, not being seals as regards the corporation, it is, in such case,

bound only by simple contract. Angell & Ames on Corp., § 295 ; 1 Pars. on Cont. 119.

30. From whence do corporations derive the power to make by-laws?

The power is either expressly given by the act of incorporation, or is tacitly annexed, as being necessarily incident to corporate bodies to enable them to fulfill the purposes of their institution ; and when the objects of the power, and the persons who are to exercise it, are not specially defined in the charter, it is necessarily limited in its exercise to those purposes, and resides in the body politic at large. 2 Kent's Com. 296.

31. Who has a right to give laws to eleemosynary corporations?

These corporations are the mere creatures of their founder, and he alone has a right to prescribe the regulations, according to which his charity shall be applied. His statutes are accordingly their laws, which they have no power to alter, modify or amend. Angell & Ames on Corp., § 330 ; 1 Shars. Bl. Com. 482.

32. What restrictions exist upon the legislative power of a corporation?

The corporate powers of legislation must be exercised strictly within the limits of its charter, and in perfect subordination to the constitution and general law of the land, and the rights dependent thereon. The general rule is, that, whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security, of individuals or the public, a statute or other special authority, emanating from the creating power, must be shown to legalize it, either expressly or by implication. 2 Kent's Com. 295 ; Angell & Ames on Corp., § 335.

33. Give the distinction between disfranchisement and amotion?

Disfranchisement is applicable only to the rights of a

member of a corporation as such ; but the term “*amotion*” applies only to such members as are officers ; and, consequently, if an officer be removed for good cause, he may still continue to be a member. 2 Kent’s Com. 297 ; Angell & Ames on Corp., § 408.

34. Are corporate powers strictly or liberally construed?

As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode and manner and subject-matter prescribed. Thus, unless authority is given in its charter, or in the act of incorporation, or by general statute, a corporation can neither issue bills, discount notes, receive deposits nor loan money. 2 Kent’s Com. 299 ; 1 Wait’s Law & Pr. 268.

35. Is it necessary that the corporate seal be impressed upon wax, or other tenacious substance, in order to make it valid?

Such is the rule at common law ; but this rule has been changed by statute in this State, and the seal of a corporation is now valid, although it is merely impressed upon the paper. 1 Wait’s Law & Pr. 270 ; Laws of 1848, ch. 197, § 1.

36. Does the law make any distinction between natural persons and corporations, so far as liabilities are concerned?

It does not. Each is legally bound to fulfill all proper duties and obligations, and each is liable for a neglect of such duties or for a breach of its obligations. Whenever any officer or agent of a corporation commits any wrongful act, while in the discharge of his duties as such officer or agent, the corporation is liable to respond in damages for the injury done. 1 Wait’s Law & Pr. 272.

37. When the charter of a corporation provides that contracts shall be made in writing, will a verbal contract, entered into by such corporation, be valid?

It will not, nor will it bind the corporation ; but unless some statute, or some rule of law, or the charter, requires the

agreement to be in writing, it may be verbal. 1 Wait's Law & Pr. 273; Angell & Ames on Corp., § 253.

38. In what ways may corporations be dissolved?

A corporation may be dissolved by statute, by the loss of all its members, or of an integral part, by death or otherwise, by surrender^r of its franchises, and by forfeiture of its charter through negligence or abuse of the privileges conferred by it. To these may be added the dissolution of a corporation by expiration of the term of its duration, limited by charter or general law, which is quite common in this country. 2 Kent's Com. 305; Angell & Ames on Corp., § 766.

39. When is a corporation dissolved, from the death of its members?

When, from death or disfranchisement, so few remain that, by the constitution of the corporation, they cannot continue the succession, to all purposes of action at least, the corporation itself is dissolved. As long, however, as the remaining corporators are sufficient in number to continue the succession, the body remains. Angell & Ames on Corp., § 768; 2 Kent's Com. 308.

40. To whom do the lands and tenements of a corporation revert, upon its dissolution?

At common law, upon the civil death of a corporation, all its real estate remaining unsold reverts to the grantor and his heirs, for the reversion, in such an event, is a condition annexed by the law, inasmuch as the cause of the grant has failed. 2 Kent's Com. 307; 1 Shars. Bl. Com. 484.

41. What becomes of the personal estate of the corporation, upon its dissolution?

The personal estate, in England, vests in the king, and, in our own country, in the people or State, as succeeding to this right and prerogative of the crown. The debts due to and from the corporation are all extinguished. Neither the stock-holders nor the directors or trustees of the corporation can recover those debts, or be charged with them, in their natural

capacity. Angell & Ames on Corp., § 779 ; 2 Kent's Com. 307.

42. How are these rules of the common law usually modified?

They are usually modified by charter or statute, and the rule, in relation to the effect of dissolution upon the property and debts of a corporation, has, in fact, become obsolete and odious. In this country its unjust operation upon the rights of both creditors and stockholders of insolvent or dissolved moneyed corporations, is almost invariably arrested by general or special statutory provisions. Angell & Ames on Corp., § 779.

43. May a corporation be revived after its dissolution?

In England the king may, either by grant or by proclamation under the great seal, revive or renovate the old corporation, or by grant or charter create a new one in its place. If the old corporation be revived, all its rights and its responsibilities are, of course, revived with it ; but if the grant operate as a new creation, the new corporation cannot be subject to the liabilities nor possess the rights of the old. Angell & Ames on Corp., § 780.

44. If a corporation should be guilty of acts or omissions which would work a forfeiture of its charter, would this be a defense in an action by the corporation?

It would not ; and, until the charter expires by its own limitation, or is annulled by the judgment of a proper court, it must be considered in full force in all actions between the corporation and individuals. 1 Wait's Law & Pr. 277.

45. Is delivery necessary to the complete execution of the deed of a corporation?

It is not, since it is said to be perfected by the mere affixing of a common seal. This rule is to be taken, however, with the important qualification that, by the affixing of the seal, the complete execution of the deed was intended. Angell & Ames on Corp., § 227.

46. May bodies corporate make contracts of bailment?

They may, the same as natural persons, provided it be done in the course of business permitted or contemplated by their charters. Thus, incorporated stage-coach companies may be liable as common carriers; and banks sue every day as lenders, and are sued as depositaries, borrowers, etc. Angell & Ames on Corp., § 241.

47. What is the distinction between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members?

In the latter case a majority of those who appear may act, but in the former a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject, and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation. 2 Kent's Com. 293; 1 Shars. Bl. Com. 478.

48. Is it necessary that corporations should be named, in order to be embraced within the terms of an act, to subject them to its prohibitions?

It is not; for it is well settled that the words *inhabitants*, *occupiers* or *persons*, may include incorporated companies. 1 Wait's Law & Pr. 268.

49. What is the general rule, as to the extent of the power of a corporation to make contracts, in the absence of any provision on the subject by statute, or in the charter or act of incorporation?

In such case the corporation has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, but none other. Thus the right to purchase property, and to do other acts relating to the corporate business, necessarily implies a right to create debts in the transaction of the affairs of the company. 1 Wait's Law & Pr. 268; Angell & Ames on Corp., § 271.

50. What is the general rule, as to the power of a corporation to sue?

It is now well settled that corporations, whether public or private, may commence and prosecute all actions upon all promises and obligations, implied, as well as expressed, made to them, which fall within the scope of their design, and the authority conferred upon them. Angell & Ames on Corp., § 370.

51. May a corporation sustain a suit, beyond the jurisdiction within which it is constituted?

It may ; and to do this it is only necessary to show that it has been regularly and effectually made a corporate body. 2 Kent's Com. 284 ; Angell & Ames on Corp., § 372.

52. May corporations make valid indorsements of accommodation notes for other persons or corporations, in which they have no interest?

They cannot ; but a corporation which owns paper may indorse it, and procure it to be discounted for its own use. And when it represents that a note belongs to itself, when, in fact, such note belongs to a third person, the corporation will be liable if the note is discounted in good faith by the bank or person advancing the money. 1 Wait's Law & Pr. 269.

53. Is notice given to an agent of a corporation sufficient notice to the corporation?

It is, if the notice relates to business which the agent is authorized to transact, and if given while he is actually engaged in transacting it. Notice given by a director to the board, at a regular meeting of the board, is notice to the corporation. 1 Wait's Law & Pr. 274.

54. Are corporations liable for torts committed by their officers or agents?

They are, if committed while acting within the scope of their business or duties. Thus an action of trover, for the conversion of goods by an agent of a corporation, is maintainable, and trespass will lie against a corporation aggregate for an act done by their agent within the scope of his author-

ity; and, in such action, it is not necessary to show the appointment or authority of the agent under the seal of the corporation. 1 Wait's Law & Pr. 276; 2 Kent's Com. 291, note *a*.

CHAPTER V.

THE LAW OF REAL PROPERTY.

1. Give the general divisions of property?

Property is divided into two classes, things real and things personal; or, in other words, into real and personal property. 2 Bl. Com. 14; Wait's Code, 801, § 464.

2. Define the words "real property," as used in law?

The words "real property" are used in law to express that kind of property which is known under the terms *lands*, *tencements* and *hereditaments*. Willard on Real Estate, 47; Wait's Code, 801, § 462; 2 Bl. Com. 16; 3 Kent's Com. 401; Laws of 1873, ch. 530.

3. What is the distinction between real and personal property?

Real property consists of things substantial and immovable, and of the rights and profits annexed to, or issuing out of them. Personal property consists of money, goods and other movables, and such rights and profits as relate to movables. 2 Bl. Com. 15; Wait's Code, 801, §§ 462, 463.

4. If certain lands be conveyed to a purchaser, and no notice be taken in the conveyance of any buildings upon or mines or minerals under the land, would such mines, buildings and minerals pass to the purchaser? State any legal maxim applicable to the question.

They will pass to the purchaser; for the ownership of land carries with it every thing above and below the surface, the maxim being *Cujus est solum, ejus est usque ad coelum*. Willard on Real Estate, 47; 2 Bl. Com. 18.

5. Suppose A grants a piece or pool of water to B, what is the extent of B's estate therein; and what words should be used to assure the freehold of it to a purchaser?

On the grant of a certain piece of water, the right of fishing passes, but not the soil. To assure the freehold of it to the purchaser, it should be conveyed as so many acres of land covered with water. 2 Bl. Com. 18.

6. Define the word "tenement?"

Tenement is a word of more comprehensive signification than *land*, and signifies every thing that may be *holden*, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Willard on Real Estate, 47; 2 Bl. Com. 17; 3 Kent's Com. 401.

7. What do you understand by the word "hereditament?"

It is the most comprehensive word that is used in deeds; for it includes not only lands and tenements, but also whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed. Willard on Real Estate, 47; 2 Bl. Com. 17; 3 Kent's Com. 401.

8. Give the distinction between corporeal and incorporeal hereditaments?

Corporeal hereditaments consist wholly of substantial permanent subjects, such as affect the senses, and may be seen and handled by the body, and are, in fact, the same as *land*; while incorporeal hereditaments are such subjects as do not affect the senses, but exist in the mind only, as rents, commons, ways and the like. Willard on Real Estate, 47; 2 Bl. Com. 17, 20; 3 Kent's Com. 401, 402.

9. What is a chattel real?

Any estate in lands which does not amount to a freehold is a chattel real. It is called a chattel real because it concerns or savors of the realty; also to distinguish it from things which have no concern with the realty. Willard on Real Estate, 49, 81.

10. What is a chattel personal?

Chattels personal consist of mere movables, and the rights connected with them.

11. What do you understand by an estate in land?

It is the interest which the owner has in the land. It does not properly denote the land itself, but the peculiar right which the owner may exercise therein. Willard on Real Estate, 47; 2 Bl. Com. 102.

12. What is the distinction between the quantity and the quality of an estate?

The quantity of an estate signifies the time of continuance or degree of interest; the quality of an estate has reference to the manner of its enjoyment, as whether it be absolutely, solely, in common, in coparcenary, or in joint tenancy. Willard on Real Estate, 48.

13. How are estates in lands divided and distinguished by the statutes of this State?

Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance. Willard on Real Estate, 48.

14. What is an estate in fee simple?

It is the largest estate or interest which the law allows any person to possess in landed property. It is the entire and absolute interest and property in the lands. Willard on Real Estate, 49; 4 Kent's Com. 3, 5.

15. What estates are termed freehold estates?

Estates of inheritance and for life are termed estates of freehold; and an estate during the life of a third person, whether limited to heirs or otherwise, is termed a freehold during the life of the grantee or devisee, but after his death, is deemed a chattel real. Willard on Real Estate, 49; 4 Kent's Com. 23, 24.

16. What is the largest, and what is the smallest estate of freehold, of which a man can be seized?

An estate in fee simple is the largest, and an estate for the

life of another, is the smallest estate of freehold of which a man can be seized. Willard on Real Estate, 49, 56; 4 Kent's Com. 5, 26.

Mark
17. Describe an estate of inheritance?

An estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successively represent him *in perpetuam* in right of blood, according to an established order of descent.

Mark
18. What is an estate tail?

An estate tail is an estate of inheritance, which can descend only to some particular heir of the person to whom it is granted, and not to his heirs generally. Willard on Real Estate, 53; 2 Bl. Com. 112.

Mark
19. State the different kinds of estates tail?

Estate tails are either *general* or *special*. The first is where lands and tenements are given to one, and the heirs of his body, without further restriction; and the second is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. 2 Bl. Com. 113; Willard on Real Estate, 53.

Mark
20. What change was effected in the laws relating to entailed estates by the Revised Statutes of 1830?

The statutes of that year abolished all estates tail, and provided that every estate which would have been adjudged a fee tail prior to 1782, should hereafter be adjudged a fee simple; and if no valid remainder be limited thereon, should be a fee simple absolute; but that where a remainder in fee is limited upon such an estate, such remainder should be valid as a contingent limitation upon a fee, and should vest in possession on the death of the first taker, without issue living at the time of such death. Willard on Real Estate, 48; 4 Kent's Com. 14, 15.

Mark
21. Do the statutes of this State recognize defeasible or conditional fees as existing estates?

They do. Willard on Real Estate, 52, 54.

22. *If A conveys an estate to B and his heirs until the marriage of C, what would be the effect of the death of C before marriage?*

The effect of the death of C before his marriage would be to change the estate of B, which was before a determinable fee, into a fee simple absolute, for the reason that the event on which the determination of the estate depended, viz., the marriage of ~~B~~ having become impossible by the act of God, the period for the determination of estate can never arise. Willard on Real Estate, 55; 4 Kent's Com. 9.

23. *What quantity of interest is conveyed with an estate for life?*

A freehold interest, an estate for life being a freehold not of inheritance. Willard on Real Estate, 48, 55.

24. *State the two different modes by which a life estate may be created, and classify the estates created under each?*

Life estates may be created (1) by the act of the parties, as by deed, and (2) by the operation of law. The estates which may be created by deed, are (1) an estate for the life of the tenant, and (2) an estate for the life of another person or persons. The estates which may be created by operation of law, are (1) an estate by the courtesy of England, and (2) an estate in dower. 4 Kent's Com. 24-26.

25. *If A grants or assigns a parcel of land "to B and his assigns forever," what estate would B take at common law, and what estate will he take under the statutes of this State?*

At common law B would take only a life interest on account of the omission of the word "heirs;" but under the statutes of this State the entire estate of A would pass to B, as it is no longer necessary to use the word "heirs" to convey a fee, and it is necessary in order to convey a life estate, that the intent to create such an estate should be expressed in the conveyance. Willard on Real Estate, 56; 4 Kent's Com. 5, 6.

26. *What terms are usually employed to distinguish a person who holds an estate for the term of his own life from a person who holds an estate for that of another?*

A person who holds an estate for the term of his own life is called a tenant for life; while a person who holds an estate during the life of another is usually called a tenant *pur autre vie*. 2 Black. Com. 120.

27. *If A having a life estate in lands conveys it to B his heirs and assigns forever, what estate will B take by the conveyance?*

As A can convey no greater estate than he possesses, B will take an estate *per autre vie*, and notwithstanding the words of perpetuity, the estate will be determined by the death of A. Willard on Real Estate, 57; 4 Kent's Com. 10.

28. *What change in the character of the estate will be effected by the death of the tenant *per autre vie*, before the death of the *cestui que vie*?*

The effect of the death of a tenant for the life of another is to change the character of the estate from a freehold to a chattel real, and the estate instead of preserving its distinctive character as real estate, becomes assets in the hands of the executors or administrators of the deceased, and is inventoried, applied and distributed as a part of his personal estate. Willard on Real Estate, 57; 4 Kent's Com. 27.

29. What is an estate by the courtesy?

It is a life estate which the law gives to the husband in the land of which his wife was seized in fee, upon her death, after the birth of issue. Willard on Real Estate, 58; 4 Kent's Com. 27, 28.

30. What four things are necessary to create this estate?

(1) Marriage; (2) seizin of the wife; (3) birth of issue, and (4) death of wife. Willard on Real Estate, 58; 4 Kent's Com. 29.

31. What is dower?

It is a life estate, which the law gives to a widow, in the

third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage. Willard on Real Estate, 61; 4 Kent's Com. 35.

32. *What three things are requisite to create dower?*

(1) Marriage; (2) seizin of the husband, and (3) death of the husband. Willard on Real Estate, 62; 4 Kent's Com. 36.

33. *Of what estate must the husband be seized in order to entitle his widow to dower?*

He must be seized during the coverture of a present freehold estate of inheritance. Willard on Real Estate, 62; 4 Kent's Com. 37-39.

34. *If A dies seized in fee of certain lands, which descend to his son subject to the dower of the mother, and dower is assigned to her in the premises, and the son dies during the continuance of her estate, to what dower will the widow of the son be entitled?*

The widow of the son will be entitled to dower in the remaining two-thirds only, and will not be entitled to dower in the reversion of that part which was assigned to the mother as tenant in dower. Willard on Real Estate, 63.

35. *Would the right of dower of the widow of the son be the same if the father had conveyed the premises to the son?*

It would not. The son would have then died seized of the entire estate subject to the mother's right of dower, and his widow would then be entitled to dower in the entire estate subject to the same right. Willard on Real Estate, 63; 4 Kent's Com. 64.

36. *What is the object of uniting the wife with the husband in his conveyance of land to a third person?*

The object is to extinguish the wife's inchoate right of dower and render the title to the land perfect. Willard on Real Estate, 64; 4 Kent's Com. 59, 60.

37. *Is the widow of the mortgagor entitled to dower out of the mortgaged premises?*

She is as against all but the mortgagee. Willard on Real Estate, 62, 63.

38. *If A and wife execute a mortgage on certain lands, and A afterward dies, to what dower will his widow be entitled on foreclosure and sale of the mortgaged premises?*

She will be entitled to dower in the surplus, if any, remaining after the payment of the mortgage debt, and the costs of foreclosure. Willard on Real Estate, 64; 4 Kent's Com. 38, 39

39. *A, being an infant, unites with her husband in conveying land to B; the husband of A afterward dies; has A any rights in the land conveyed to B?*

She has still her right of dower. An infant cannot bar her right of dower by uniting in a conveyance with her husband. Willard on Real Estate, 64.

40. *A and B make an exchange of the lands owned by them, each conveying to the other an estate equal in quantity to the one received, in consideration of a like conveyance by the other; if A dies leaving a widow, can she claim dower in the estate given to, as well as the estate received from B in exchange?*

She cannot have dower in both estates, but she may elect out of which estate dower shall be assigned her. In the default of the commencement of proceedings to recover dower out of the estate given B in exchange, within one year from the death of her husband, she will be deemed to have elected to take her dower out of the estate received in exchange from B. Willard on Real Estate, 64; 4 Kent's Com. 59.

41. *What effect has a decree of divorce on the wife's right of dower?*

An absolute divorce dissolving the marriage contract for the misconduct of the wife, is fatal to her right of dower. But where the divorce is obtained by the wife, for the adultery of the husband, she is still entitled to dower in lands of which he was seized prior to the divorce. A decree of divorce, *a mensa et thoro* does not work a forfeiture of the right of dower in which the husband was seized prior to the decree. Willard on Real Estate, 66, 70; 4 Kent's Com. 54.

42. What would be the effect of a decree of nullity on a claim for dower?

It would be a bar to the claim. Willard on Real Estate, 66.

43. What is a jointure?

Jointure is an estate for the life of the wife, to take effect in possession or profit immediately after her husband's death, and arises by the express contract of the parties, and is in lieu of dower. Willard on Real Estate, 66.

44. What is necessary to make a jointure a bar to a right of dower?

It is necessary that the wife, in person or by guardian, should become a party to the conveyance by which the jointure is settled. Willard on Real Estate, 66.

45. Can dower be barred by any jointure other than in an estate in lands?

It may be barred by any pecuniary provision that shall be made for the benefit of the intended wife and in lieu of dower, if such wife shall manifest her assent to the jointure by becoming a party to the instrument in which the pecuniary provisions are made. Willard on Real Estate, 67; 4 Kent's Com. 58.

46. When may a wife elect between a jointure and dower?

If before coverture, and without the assent of the intended wife, or if after coverture lands are given for the jointure of the wife, or pecuniary provision is made for her in lieu of dower, she is entitled to elect whether she will take the jointure or pecuniary provision, or whether she will be endowed in her husband's lands. She is not entitled to both. Willard on Real Estate, 68.

47. Can a husband, by testamentary provision or otherwise, bar his wife's right of dower?

He cannot. Dower is a legal right over which the husband has no direct control. On acceptance by the wife of an offer by the husband of something in lieu of dower, it will operate

as a dower ; but it is the acceptance by the wife, and not the offer by the husband, which has that effect. Willard on Real Estate, 68.

48. When will a widow be compelled to elect between dower and a provision made for her in her husband's will ?

Only where the testator declares that the legacy shall be in lieu of dower, either in express words or by necessary implication. Where the intent of the testator is not expressly declared, the widow may claim both the legacy and dower, unless the provisions of the will are so utterly inconsistent with her claim for dower that the intention of the testator, in relation to some part of the property devised to others, would be defeated if such claim were allowed. Willard on Real Estate, 68.

49. When will the law presume that the widow has elected to take her jointure, devise or pecuniary provision in lieu of dower ?

When she has failed to enter on the lands to be assigned to her for dower, or to commence proceedings for the recovery or assignment thereof within one year after the death of her husband. Willard on Real Estate, 69.

50. When will a jointure, devise or pecuniary provision, in lieu of dower, be forfeited by the act of the wife ?

Upon her conviction for adultery, in an action brought by her husband for an absolute divorce. Willard on Real Estate, 71.

51. By a conveyance, properly executed, a certain block of buildings was conveyed to B, and his heirs, so long as the village in which the land was situated should be unincorporated. Is the estate of B in the land sufficient to support a claim for dower therein, in case he should die leaving a widow surviving him ?

It is. A widow is entitled to dower, where the husband was seized of a defeasible or conditional estate of freehold of inheritance. But the dower will be defeated on the happening of the event upon which the estate is limited, as on the incor-

poration of the village, in the case given. Willard on Real Estate, 71.

52. *A, being the owner of certain lands, conveys the same to B, the wife of A not joining in the conveyance; B thereupon places certain valuable buildings upon the land so conveyed, and continues to improve the same until the death of A, when A's widow puts in a claim for dower in the land. Is the widow of A entitled to dower in the land, according to its value at the time of the death of A?*

She is not. She is entitled to dower in the land according to its value at the time of its alienation. Willard on Real Estate, 72; 4 Kent's Com. 65-68.

53. *What do you understand by the term "widow's quarantine"?*

It is a term used to designate the forty days immediately following the death of the husband, during which the widow is entitled to remain rent free in the chief house of her husband, and to have her reasonable sustenance out of the estate. Willard on Real Estate, 73; 4 Kent's Com. 61.

54. *Within what time must a widow demand her dower?*

She must demand her dower within twenty years from the death of her husband unless she was under some disability at the time of such death, in which case the twenty years run from the time of the removal of the disability. Willard on Real Estate, 74.

55. *In what cases will a life estate merge in the inheritance?*

Where the tenant for life surrenders the reversion, or where the tenant for life acquires the absolute property, the life estate becomes merged in the fee simple. Willard on Real Estate, 76-92.

56. *Upon the death of a tenant for life will his executors or the reversioner be entitled to emblements?*

On the failure of the tenant to bequeath them, they go to the executor or administrator of the deceased, to be distributed with the personal estate. Willard on Real Estate, 77; 4 Kent's Com. 73.

57. Mention the estates less than freehold?

They are either : 1. Estates for years ; or 2. Estates at will ;
3. Tenancies from year to year ; or 4. Estates at sufferance.
Willard on Real Estate, 80.

58. What are estates for years, and what denomination of property are they ?

Estates for years are only chattels real ; and they form part of the personal estate. Willard on Real Estate, 81.

59. Is it essential to an estate for years that its duration should be limited to at least one or more years ?

It is not. An estate for a month or week is treated as an estate for years, that being the shortest period of which the law takes notice. Willard on Real Estate, 80 ; 4 Kent's Com. 85.

60. A having leased a house for five years at a stipulated rent, occupied the premises but one month when the house was destroyed by fire. Is he liable for the rent while it continues uninhabitable ?

He is, at common law, in the absence of any provision in the lease to the contrary. But in this State the rule has been reversed by statute. Laws of 1860, ch. 345 ; 1 Wait's Law & Pr. 197 ; Willard on Real Estate, 83.

61. Upon what does the right of a tenant of an estate for years to the outgoing crop depend ?

It depends either upon the uncertain termination of the estate, or upon the express provisions in the lease in relation thereto. If the lease is for a certain number of years and contains no covenants or stipulations on the subject, the tenant is not entitled to the outgoing crop ; but if the termination of the estate depends upon an uncertain event the tenant is entitled to the outgoing crop in the absence of an agreement to the contrary. Willard on Real Estate, 82 ; 4 Kent's Com. 109.

62. What is a "fixture"?

Technically speaking, a fixture is any thing of an acces-

sory character annexed to houses and lands so as to constitute a part of them. The term is also used to denote personal chattels annexed to the freehold, but removable by the person annexing them. 1 Wait's Law & Pr. 602.

63. By what test may you determine whether a thing annexed to the freehold by a tenant is a fixture or not?

The true criterion of a fixture is the united application of three requisites: First. Actual annexation to the realty or something appurtenant thereto; Second. Application to the use or purpose to which that part of the realty with which it is connected is appropriated; Third. The intention of the party making the annexation to make a permanent accession to the freehold. *Potter v. Cromwell*, 40 N. Y. (Hand) 287; *Traff v. Hewitt*, 1 Ohio St. 511.

64. Will the mode of annexation alone determine whether the thing is annexed is a fixture and a part of the realty, or whether it is still personal property and removable?

It will not. The mode of annexation is but evidence of the intention with which the tenant made the annexation at the time. Willard on Real Estate, 86.

65. What then is the most important question of fact to be settled in determining whether a thing annexed to the freehold is personal property or a part of the realty?

The intention with which the tenant made the annexation. Willard on Real Estate, 86; *Potter v. Cromwell*, 40 N. Y. (1 Hand), 287.

66. State the general rule as to the right of a tenant to remove additions or improvements which he has made upon lands during his term?

It is a general rule, that any one who has a temporary interest in land, and who makes additions to it, or improvements upon it for the purpose of the better use or enjoyment of it while such temporary interest continues, may at any time before his right of enjoyment expires, rightfully remove such additions and improvements. If he omit to sever the addition or improvement, until his right of enjoyment ceases,

such omission is to be deemed an abandonment of his right, and thereafter the addition or improvement becomes a part of the inheritance, and the tenant who severs it becomes a trespasser. 1 Wait's Law & Pr. 604; Willard on Real Estate, 86.

67. Has the lessee of a farm a right to remove the manure made thereon?

In the absence of a provision in the lease, or of a special custom to the contrary, the manure made upon a farm belongs to the farm and not to the tenant; and the tenant has no more right to dispose of it to others, or remove it himself from the premises, than he has to dispose of or remove a fixture. Willard on Real Estate, 85; 1 Wait's Law & Pr. 195.

68. What do you understand by a surrender?

A surrender is a yielding up of an estate for life, or for years, to the person having an immediate estate in reversion or remainder. Willard on Real Estate, 91; 4 Kent's Com. 103, 104.

69. What is meant by the merger of a term of years?

When a person is possessed of a term of years and afterward becomes possessed of the freehold, whether in fee or for life, if both estates are in the same right, and no other estate intervenes, the term will become swallowed up in the freehold, or in technical language merged in it. Willard on Real Estate, 92.

70. What are the requisites to produce a merger of an estate?

There must be a greater and a less estate meeting in the same person, in the same right, without any intermediate estate, which will at once cause the less estate to be merged in the greater. Willard on Real Estate, 306.

71. What is a tenancy at will?



It is one held at the will of both parties, landlord and tenant, so that either of them can determine it at his pleasure. Willard on Real Estate, 94; 4 Kent's Com. 110-115.

72. Where a party goes into possession of lands of another without any agreement as to duration of his tenancy, what will be his estate therein?

It will be considered as an estate from year to year, as the courts now lean against tenancies at will. Willard on Real Estate, 95.

73. If A leases a farm to B, for one year at a specified rent, and B holds over after the expiration of his term, without any new agreement as to the rent, what will then be the character of B's tenancy?

The law will imply that B holds from year to year at the original rent. Willard on Real Estate, 95; 1 Wait's Law & Pr. 194.

74. What is a tenancy at sufferance?

A tenancy at sufferance is where a person has originally come into possession of an estate by a lawful title, and holds such possession after his title has determined. Willard on Real Estate, 97; 4 Kent's Com. 116.

75. What is a condition, as the term is used in speaking of estates in lands?

A condition is some quality annexed to real estate, by virtue of which it may be created, enlarged or defeated upon the happening of an uncertain event. Willard on Real Estate, 100; 2 Bl. Com. 151; 4 Kent's Com. 121.

76. Give the general divisions of estates upon condition?

There are two general divisions: (1) Estates upon condition implied, and (2) estates upon condition expressed. The first are called conditions in law, and the second are called conditions in deed. 2 Bl. Com. 152; Willard on Real Estate, 100; 4 Kent's Com. 121.

77. What is the distinction between a limitation and a condition?

A limitation is where an estate is so limited by the words of its creation that it cannot endure for a longer time than till the contingency happens upon which the estate is to fail; but

when an estate is upon condition, as upon condition that A removes to a certain place to reside, the law permits the estate to endure beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the estate. 2 Bl. Com. 154; Willard on Real Estate, 102.

78. When are express conditions void in their creation?

When they are (1) *impossible* at the time of their creation, or afterward become so by the act of God or the act of the grantor; or (2) when they are contrary to law, human or divine; or (3) when they are repugnant to the nature of the estate. 2 Bl. Com. 156; Willard on Real Estate, 103.

79. If A should grant to B an estate in fee, upon condition that B shall not alien such estate, would the condition be valid?

It would not, for the reason that it would be repugnant to the estate conveyed. Restraints upon alienation can, at common law, be imposed only by persons having a reversion, or at least a possibility of reversion, therein, and no reversion or possibility of reversion can remain in the grantor of an estate in fee simple. Willard on Real Estate, 104.

80. What is the difference between the effect of a condition precedent and a condition subsequent?

Conditions precedent are such as *must* happen or be performed before an estate can vest or be enlarged. Conditions subsequent are such as *may* defeat an estate already vested by reason of their failure or non-performance. 2 Bl. Com. 154; Willard on Real Estate, 105.

81. What is a mortgage?

It is a conveyance of lands, by a debtor to his creditor, as a pledge or security for the re-payment of a sum borrowed, with a proviso that such conveyance shall be void on payment of the money secured by it, with interest, on a day specified. Willard on Real Estate, 109; 4 Kent's Com. 135.

82. *What power of sale is usually contained in a mortgage?*

A mortgage usually contains a power authorizing the mortgagee, his executors, administrators or assigns, to sell the premises described, with their appurtenances, in the manner prescribed by law, in case of any default in the payment of the money secured by the mortgage, and out of the money arising on such sale to retain the principal, interest and costs, and to render the overplus to the mortgagor, his heirs or assigns. Willard on Real Estate, 110.

83. *Is it necessary that a mortgage should contain a power of sale, or a covenant to pay money?*

It is not. Willard on Real Estate, 110.

84. *If A conveys his land to B, absolutely, and B, by a separate instrument, covenants to reconvey to A, on payment by A of a certain sum, are the rights of the parties changed by the fact that the conveyance and defeasance are separate instruments?*

They are not. The transaction amounts only to a mortgage. Willard on Real Estate, 111; 4 Kent's Com. 141.

85. *Can a deed, absolute upon its face, be shown to be a mortgage, without the production of the written defeasance?*

It can be shown to be a mortgage by parol evidence. Willard on Real Estate, 113; 4 Kent's Com. 142, 143, note.

86. *What must be the form of an assignment of a mortgage to be valid under the provision of the statute of frauds, which declares that no estate or interest in lands, except leases for one year, shall be assigned unless by operation of law, or by a deed or conveyance in writing subscribed by the party assigning the same?*

It need not be in any particular form, as an assignment of a mortgage is not a conveyance of land within the meaning of the statute. An assignment by a mere delivery is as valid as a written assignment under seal. Willard on Real Estate, 113.

87. *Explain what is meant by the term "equitable mortgage?"*

An equitable mortgage means that a debtor has in equity created a charge on his estate in favor of his creditor, without having clothed such creditor with the legal estate. Willard on Real Estate, 114.

88. *If A conveys land to B, taking B's note for a part of the purchase-money, and B afterward conveys the land to C, has A such a lien upon the premises so conveyed as to secure the payment of the residue of the purchase-money, in case of default in the payment of the notes?*

While the title to the land remained in B, A had a lien upon the land for the purchase-money, in the nature of an equitable mortgage. If C purchased of B with notice of the existence of this lien, or without advancing any new consideration, the lien upon the land is still existing; but if C purchased without notice, and for a full consideration, the lien is defeated, and A's remedy upon the land destroyed. Willard on Real Estate, 114; 4 Kent's Com. 151, 152, note.

89. *If A, without notice of a prior unrecorded mortgage, purchases land of B in good faith, and for a valuable consideration, and places his conveyance upon record, how will the subsequent recording of such mortgage affect his title?*

It will not affect his title in any way; B will continue to hold the land discharged of the lien of the mortgage. Willard on Real Estate, 121; 4 Kent's Com. 168-171.

90. *What formalities in the execution of a mortgage must be observed in order to entitle it to be recorded?*

The mortgage must either be acknowledged by the mortgagor, before a proper officer, or be attested at the time of its execution, by one or more subscribing witnesses, by whom it can be proved. Willard on Real Estate, 123.

91. *Which will be entitled to preference, an unrecorded mortgage or a subsequent judgment docketed?*

The mortgage. Willard on Real Estate, 124; 4 Kent's Com. 173.

92. *Which will be entitled to preference, a mortgage given to secure the payment of purchase-money, or a prior judgment against the mortgagor?*

The mortgage. Willard on Real Estate, 124.

93. *What is the nature of the interest of the mortgagor and mortgagee respectively in the premises mortgaged?*

The mortgagor is the owner of the freehold, and the mortgagee has a mere chattel interest. Willard on Real Estate, 125.

94. *How would you proceed if your client was the mortgagee of certain premises, and the mortgagor was impairing the value of the mortgage security by cutting down the timber thereon?*

I would obtain an injunction restraining the mortgagor from cutting down more timber than was necessary for firewood and the necessary repairs about the premises. Willard on Real Estate, 127.

95. *When the mortgage debt has been paid, how is the mortgage discharged of record?*

In order to obtain a legal discharge of a mortgage of record, it is necessary to present to the officer in whose custody it is, a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as is required to entitle conveyances to be recorded, specifying that the mortgage has been paid, or otherwise satisfied or discharged; upon which it is the duty of the officer to record the certificate and proof or acknowledgment of the same, and make a minute of the discharge upon the record of the mortgage. Willard on Real Estate, 129.

96. *What is the effect of a tender by the mortgagor to the mortgagee of the sum due on a mortgage?*

If a mortgagor, at any time before actual foreclosure, tenders to the mortgagee the amount of the mortgage debt, and the mortgagee refuses to receive it, the land is freed forever from the condition, although the debt is not extinguished. From the time of such tender the liability of the mortgagor takes the character of a mere personal debt. Willard on Real Estate, 130.

97. *A loans money to B and takes as security therefor a bond and mortgage on certain lands of B, and on default in the payment of the debt forecloses the mortgage, receiving from the sale of the land less than the sum due. Has he any further remedy against B, or will the foreclosure and sale operate as an extinguishment of the debt?*

He has still his remedy by action on the bond. The foreclosure and sale operate as an extinguishment of the mortgage debt only to the amount produced by the sale. Willard on Real Estate, 141.

98. *How are estates divided with respect to the time of their enjoyment?*

Into estates in possession and into estates in expectancy. Willard on Real Estate, 156; Bingham on Real Estate, 12.

99. *What are the statutory divisions of estates in expectancy?*

Estates in expectancy are divided into: 1. Estates commencing at a future day, denominated future estates; and 2. Reversions. Future estates are created by the act of the parties; and reversions by the act of law. Willard on Real Estate, 156; Bingham on Real Estate, 42.

100. *What is the distinction between vested and contingent future estates?*

Future estates are vested where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent while the person to whom, or the event upon which they are limited to take effect, remains uncertain. Willard on Real Estate, 158; Bingham on Real Estate, 42.

101. *State the rule in Shelly's case?*

Whenever an estate of freehold is given, and by the same conveyance or will an ~~interior~~ estate (whether mediately or immediately) is limited to the heirs of the same person in fee or in tail, such ulterior estate vests in that person himself in the same manner as if it had been expressly given to him and his heirs; the word "heirs" being a word of limitation and

not of purchase. Willard on Real Estate, 166; 4 Kent's Com. 200-213.

102. Is the rule in Shelly's case a part of the law of this State?

It is not. The statutes provide that whenever a remainder shall be limited to the heirs of the body of a person to whom a life estate in the premises shall be given, the person who, on the determination of the life estate, shall be the heir or heirs of the body of such tenant for life, shall be entitled to take as purchasers by virtue of the remainder to them. Willard on Real Estate, 167; 4 Kent's Com. 211, note.

103. What is an estate in reversion?

It is defined in the Revised Statutes, as the residue of an estate, left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. 1 R. S. 743, § 12; Willard on Real Estate, 174; 4 Kent's Com. 353.

104. What is an estate in severalty?

It is an estate held by a man in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. Willard on Real Estate, 176; Bingham on Real Estate, 172.

105. Who are joint tenants at common law?

Where an estate is acquired by two or more persons in the same land by the same title (not being a title by descent), and at the same period, *and without any words importing that they are to take in distinct shares*, they will take the estates as joint tenants. Bingham on Real Estate, 172, 173; Willard on Real Estate, 177; 2 Bl. Com. 180; 4 Kent's Com. 357.

106. What fourfold unity is necessary to the existence of a joint tenancy?

1. Unity of interest; 2. Unity of title; 3. Unity of time, and 4. Unity of possession; or in other words, joint tenants must have one and the same interest, accruing by one and the

same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 2 Bl. Com. 180.

107. What is a tenancy in common at common law?

A tenancy in common, at common law, is where two or more hold the same land with interests accruing under different titles; or accruing under the same title (*other than descent*), but at different periods; or, *conferred by words of limitation importing that the grantees are to take distinct shares*; the only unity requisite to create a tenancy in common being a unity of possession. 2 Bl. Com. 192; Bingham on Real Estate, 175; Willard on Real Estate, 182; 4 Kent's Com. 367, 368.

108. What was an estate in coparcenary at common law, and who were coparceners?

An estate in coparcenary was where lands of inheritance descended from the ancestor to two or more persons.

Where a person seized in fee simple or fee tail died, and his next heirs were two or more females, they all inherited; and these co-heirs were called *coparceners*, or for brevity *parceners* only. 2 Bl. Com. 187; Bingham on Real Estate, 174; 4 Kent's Com. 366.

109. In what respect did an estate in coparcenary resemble an estate held in joint tenancy?

In requiring three of the essential properties of an estate in joint tenancy, viz., unity of interest, unity of title and unity of possession. 2 Bl. Com. 188; 4 Kent's Com. 366.

110. In what respect do estates in joint tenancy, under the Revised Statutes, differ from estates in joint tenancy at common law?

In the mode of their creation. At common law, where an estate was acquired by two or more persons in the same lands, by the same title and at the same period, the estate was a joint tenancy *unless* there was something in the language of the instrument of conveyance indicating the intention that the lands should be held in severalty, in which case it became a

tenancy in common. Under the statutes, the rule is precisely the reverse, and no estate in joint tenancy can be created by any conveyance, other than to executors or trustees, unless the premises therein mentioned are thereby expressly declared to pass, not in tenancy in common, but in joint tenancy. In the absence of such express declaration the estate is a tenancy in common. Bingham on Real Estate, 173; Willard on Real Estate, 177.

111. *In what respects do estates, held in tenancies in common under the Revised Statutes, differ from estates so held at common law?*

(1) In being created without express words indicating an intention that they should be held in severalty; and (2) in the possibility of having been acquired by descent and not by purchase, as the statute has placed coparceners among tenants in common, by providing that whenever an inheritance shall descend to several persons, they shall take as tenants in common, in proportion to their respective rights. Willard on Real Estate, 177; Bingham on Real Estate, 175.

112. *What is the principal incident of an estate in joint tenancy?*

The *jus accrescendi* or right of survivorship, which passes the interest of a deceased joint tenant to the surviving co-tenant or co-tenants. Willard on Real Estate, 179; 4 Kent's Com. 360.

113. *If an estate is granted or devised to a husband and wife, and their heirs, what would the estate be called?*

An estate by entireties; and they would hold the estate as one individual. Willard on Real Estate, 180; 4 Kent's Com. 363.

114. *If there be three joint tenants in fee simple, and one of them releases his share to another of the three, what is the effect of such release, and what are the estates or interests of the various parties after such release?*

The effect of the release would be to destroy the joint tenancy as to the part released, and to make the releasee a

tenant in common with the remaining co-tenant, as to that part, while as to the remaining two-thirds they will still be joint tenants. Willard on Real Estate, 181.

115. *A testator devises land to A and B and their heirs to be held in joint tenancy. A dies intestate leaving a son, and afterward B dies intestate leaving two daughters, one of whom dies intestate leaving a son. Who can convey the land to the purchaser?*

The surviving daughter of B, and the son of the deceased daughter are the proper parties to convey the land. The estate being originally a joint tenancy, the entire estate, by the right of survivorship, passed to B on the death of A; and on the death of B, the estate descended to his two daughters as tenants in common, and as between them there would be no right of survivorship. Willard on Real Estate, 179, 183.

116. *Can one tenant in common of a single house or a single field separate his interest from that of the other tenant in common?*

One tenant in common cannot act against the rights of his associates, convey a distinct portion of the estate by metes and bounds. But one tenant in common may claim a partition of the estate held in common as a matter of right; and if a partition cannot be made by metes and bounds without great prejudice to the owners, the court may order a sale of the premises at public auction to the highest bidder and pay the proceeds, less the costs and charges, to the respective parties, according to their respective interests in the fund. Willard on Real Estate, 185; Wait's Code, 786, note c.

117. *How may a joint tenancy or a tenancy in common be severed?*

A joint tenancy may be severed: (1) By partition; or (2) By alienation without partition, as where one joint tenant conveys his estate to a third person, and thus creates a tenancy in common, or releases his share to the other, and turns it into an estate in severalty; or (3) By an accession of interest, as where there are two joint tenants for life, and the inheritance is purchased by or descends upon either, thus severing

the jointure. A tenancy in common may be dissolved (1) By partition; or (2) By uniting all the titles and interests in one tenant, by purchase or otherwise, thus bringing the whole to one severalty. Willard on Real Estate, 180, 185; 4 Kent's Com. 364, 369, 370.

118. *A and B are joint tenants in fee. A devises his real estate and dies before B. Is the joint estate severed by the devise?*

No. A devise by a joint tenant of his share by will is no severance of the jointure Willard on Real Estate, 179.

119. *How may trustees convey an estate held by them in their character as trustees?*

By all uniting in the conveyance. Willard on Real Estate, 182.

120. *Define incorporeal hereditaments, and specify such as exist under the statutes of this State?*

An incorporeal hereditament is a right issuing out of a thing corporate, whether real or personal, or concerning, or annexed to, or exercisable within the same. 2 Bl. Com. 20. The rights which are so termed in this State, are commons, ways, franchises, annuities and rents. Willard on Real Estate, 189; 3 Kent's Com. 402, 403.

121. *What is a right of way?*

It is the privilege which one or more persons enjoy of going over the land of another. Willard on Real Estate, 193; 3 Kent's Com. 419, 420.

122. *How may a right of way be acquired?*

(1) By grant; (2) By an exception and reservation to the grantor in the conveyance which passes his estate in other respects to the grantee; (3) By prescription and immemorial usage; and (4) From necessity. Willard on Real Estate, 194; 3 Kent's Com. 420.

123. *What is an easement?*

An easement is a privilege without profit, which the owner of a neighboring tenement hath of another, existing in respect

to their several tenements by which the servient owner is obliged to suffer, or not to do, something on his own land for the advantage of the owner of other land, who is called the dominant owner. Bingham on Real Estate, 17; 3 Kent's Com. 434.

124. When will a right of way by prescription arise, and upon what is it founded?

A right of way by prescription will arise by virtue of an uninterrupted use of a particular way or road for the period of twenty years, under a claim of right adverse, or in hostility, to that of the owner of the land. The right by prescription is founded upon a supposition that a grant of the right of way was originally made. Willard on Real Estate, 194; 3 Kent's Com. 442.

125. When will a person be said to have a right of way from necessity over the lands of another?

When a person having a parcel of land surrounded by his own land, or by his own land and the land of another, grants the land so surrounded, the grantee and those claiming under him have a right of way by necessity through the lands of the grantor. Willard on Real Estate, 194.

126. Is it the duty of the grantee, or of the grantor of a right of way to keep the way in repair?

It is the duty of the grantee, unless the grant contains covenants to the contrary. Willard on Real Estate, 196.

127. How will the grant of a franchise conferring exclusive privileges be construed?

It will be construed strictly and will not be extended by implication. Willard on Real Estate, 201.

128. What is rent?

Rent is a certain profit issuing yearly out of lands and tenements corporeal. 2 Bl. Com. 41. Or in language less technical, "it is the compensation to the proprietor of land for the right to occupy his land and enjoy its annual profits." Bingham on Real Estate, 554; 3 Kent's Com. 460.

129. What is a rent-charge, and how created?

A rent-charge arises on a grant by one person to another of an annual sum of money, payable out of certain lands, in which the grantor has an estate. It can be created or transferred by deed only, unless it be given by will. Willard on Real Estate, 204; 3 Kent's Com. 461.

130. What contract right is inseparable from a rent-charge?

The instrument creating a rent-charge must always contain a provision that the owner of the rent may, upon default of payment, enter upon certain land, and distrain and appropriate the personal property thereon to the payment of the amount due. Bingham on Real Estate, 557; 3 Kent's Com. 461.

131. What is a rent-seck?

A rent-seck is a rent-charge, without the right to distrain. Willard on Real Estate, 204; Bingham on Real Estate, 557, 559; 3 Kent's Com. 461.

132. When may a landlord recover in an action for the use and occupation of lands or tenements?

Whenever such lands or tenements have been occupied by any person under any agreement not made by deed. Willard on Real Estate, 214; 1 Wait's Law & Pr. 717.

133. How will an agreement to pay a fixed sum, as rent, affect the right of recovery in an action for use and occupation?

It will not affect the right of recovery, but will furnish the measure of damages to be recovered. If no certain rent is reserved, the landlord can recover a "reasonable satisfaction for the use and occupation." Willard on Real Estate, 214; 1 Wait's Law & Pr. 717, 719.

134. If A enters into possession of land owned by B, under a contract to purchase, and afterward refuses to complete the purchase, can B maintain an action for use and occupation?

He cannot. The action for use and occupation will lie

only where the relation of landlord and tenant exists between the parties, and will not lie against one who comes into possession in the character of a purchaser. 1 Wait's Law and Pr. 717; Willard on Real Estate, 216.

135. *A, after building a house upon his land, sells the lot adjoining to B, who proceeds to build upon the lot in such a manner as to render the windows of A's house, upon that side, of no avail. Has A any remedy?*

He has not. He should have protected his own lot by a condition in the grant of the adjoining lot, or by a covenant that his windows should not be obstructed. Willard on Real Estate, 219; 3 Kent's Com. 448, note.

136. *What is the greatest right which a man can acquire in water flowing along or through his lands?*

A right to its use only. Willard on Real Estate, 222; 3 Kent's Com. 439.

137. *A being the owner of land upon which was a spring that flowed naturally on to the land of B, diverted the water from its natural channel by carrying it in shallow ditches through his fields for the purposes of irrigation, whereby B was deprived of its use. Has B any remedy?*

He has. A may be enjoined from so using the water of the spring, that it shall not flow in its natural channel on to the lands of B. Willard on Real Estate, 222; Wait's Code, 384 e.

138. *When lands adjoin a river, to whom does the soil of the river presumptively belong?*

The soil of one-half of the river, to the middle of the stream, is presumed to belong to the owner of the adjoining land; but if the stream be navigable, the rights of the owners are subject to the public use of it as a highway; but if it be a tidal river, the soil up to high water mark belongs to the State. Willard on Real Estate, 220; Thompson's Prov. Rem. 233; 3 Kent's Com. 427.

139. *Is the old law of uses and trusts as it existed prior to the revision of the statutes of this State in 1830, still a part of the law of this State?*

It is not, except in a very limited degree. The Revised Statutes abolished uses and trusts except as authorized and modified therein, and declared that every estate and interest in lands should henceforth be deemed a legal right, cognizable as such in the courts of law, except as otherwise provided. Willard on Real Estate, 229, 232; 4 Kent's Com. 300.

140. *What were resulting trusts prior to the Revised Statutes?*

They were trusts arising or resulting by implication of law. Such a trust occurred when A purchased land with the money of B, and took the deed in his own name, a trust then resulting in favor of B. Willard on Real Estate, 234; 4 Kent's Com. 305.

141. *What changes in the law of resulting trusts were introduced by the Revised Statutes?*

The statutes put an end to resulting trusts arising from the *voluntary* payment of purchase-money by one person, and the taking of the conveyance in the name of another, so far as relates to any trust *in favor of the person making such payment*. But they further provided that such conveyance should be presumed fraudulent as against the creditors, *at that time*, of the person paying the consideration, and that, if such presumption be not rebutted, a trust should result in favor of such creditors to the extent that might be necessary to satisfy their just demands. Willard on Real Estate, 235.

142. *If A should purchase land with the money of B, and take an absolute conveyance in his own name, without the knowledge or consent of B, would the title to the land rest in A, under the statutes of this State?*

It would not. The provisions of the statute abolishing resulting trusts, are not applicable to such cases. Willard on Real Estate, 235.

143. *For what purposes may express trusts be created under the original provisions of the Revised Statutes?*

(1) To sell lands for the benefit of creditors ; (2) To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon ; and (3) To secure the rents and profits of lands and apply them to the use of any person during the life of such person, or for a shorter term, subject to the rules prescribed by law. Willard on Real Estate, 237 ; 4 Kent's Com. 310.

144. *State generally the cases in which express trusts may be created under subsequent statutes?*

Under the act of 1840, real and personal estate may be conveyed (1) To incorporate colleges, or other literary incorporated institutions, to be held in trust for the purposes of establishing and maintaining observatories, founding professorships and scholarships, etc. ; (2) To the corporation of cities and villages, to be held in trust for the purposes of education, for the relief of distress, or for parks, gardens, etc. ; and (3) To the superintendents of common schools of any town, and the trustees of any school district, in trust, for the benefit of the common schools of such town or district. This act was further amended and its application defined by the acts of 1846, and 1855.

145. *How may trusts be created?*

'By will, or by deed or grant. Willard on Real Estate, 242.

146. *In case of the death of the trustee, leaving the trust unexecuted, in whom does the trust estate vest?*

In the supreme court. Willard on Real Estate, 245.

147. *When will a trust estate cease?*

When the purposes for which it was created have ceased. Willard on Real Estate, 247.

148. *What is a power?*

It is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the

owner granting or receiving such power, might himself lawfully perform. 1 R. S. 732, § 74; Willard on Real Estate, 250; 4 Kent's Com. 318, note.

149. *How many classes of powers are there?*

Two general classes, viz., statutory powers and common-law powers.

The powers authorized by the revised statutes are also distinguished as *general* or *special*, *beneficial* or *in trust*, and the definitions of each class are given by the statutes creating them. Willard on Real Estate, 252; 1 R. S. 732, §§ 76-79; 4 Kent's Com. 318.

150. *What is the general rule as to the manner in which a power must be executed?*

It is a general rule that, where the instrument creating a power prescribes the manner of its execution, the power must be executed in that manner, or the act will be void. Willard on Real Estate, 262.

151. *What is a power of attorney?*

A power of attorney is a writing under seal, by which the party executing it appoints another to be his attorney, and authorizes him to act for him, either generally or specially. Willard on Real Estate, 268.

152. *When and how may a power of attorney be revoked?*

A power of attorney may be revoked by an instrument of the same nature, viz., by an instrument in writing under seal, executed by the person or persons giving the power, and at any time before the power is executed. It may also be revoked by death. But when a power of attorney is coupled with an interest, as in case of a power of sale in a mortgage, it is irrevocable by death or otherwise. Willard on Real Estate, 269, 270.

153. *Has an attorney a right to delegate his authority to any other person?*

He has no such power unless it is given by the instrument under which he acts. Willard on Real Estate, 270.

154. *If a purchase-deed is executed under a power of attorney from the vendor, in whose name should it be executed, and what is necessary for the purchaser to consider?*

The deed should be executed in the name of the vendor, adding the words, "by A B, his attorney." The purchaser should satisfy himself that the vendor is living at the time of the execution by the attorney, as a power of this kind expires at the death of the principal. Willard on Real Estate, 271.

155. *When a power of attorney to sell lands has been recorded, what is necessary to render a revocation by deed under seal effectual?*

That the instrument containing the revocation should be recorded in the same office in which the instrument containing the power was recorded. Willard on Real Estate, 269.

156. *In whom is the ultimate and absolute right of property in land?*

In the State, in its corporate and sovereign capacity. Bingham on Real Estate, 2; Willard on Real Estate, 42.

157. *How many modes are there of acquiring title to real property?*

There are two: by descent and purchase. A title by descent vests in a person by operation of the law, while a title by purchase vests by the act and agreement of the party. Willard on Real Estate, 315; 4 Kent's Com. 373.

158. *If a person who is illegitimate dies intestate, leaving no legitimate issue, who becomes entitled to any freehold of which he may die possessed?*

Bastards, being *filius nullius*, cannot, with one exception, be heirs themselves, or have any heirs but those of their own bodies. Therefore if he dies intestate, seized of an estate in fee, it will revert or escheat to the State. Willard on Real Estate, 318.

159. *What exception is there to the common-law rule that illegitimate children are incapable of inheriting?*

By the act of 1855, illegitimate children may, in default

of lawful issue, inherit real and personal property from their mother, as if legitimate. This is, however, the only exception to the rule. Willard on Real Estate, 318; Laws of 1855, ch. 574.

160. Does the common-law rule, that aliens cannot take by descent, remain unaffected by the statutes of this State?

It does not. The rigor of the common-law rule has been mitigated by statute, to the extent that an alien may take title to real estate by descent, by taking the initiatory steps prescribed by statute to become a citizen of the United States. Willard on Real Estate, 320; Bingham on Real Estate, 103.

161. What is the effect of conviction for treason on the right to hold real estate?

Conviction for treason works a forfeiture to the people of the State, during the life of the person convicted, of every freehold estate in lands of which such person was seized in his own right, at the time such treason was committed, or at any time thereafter. Willard on Real Estate, 322.

162. State the mode in which the real estate of any person who dies intestate will descend, under the statutes of this State?

The estate of such persons would descend: (1) To his lineal descendants; (2) To his father; (3) To his mother; and (4) To his collateral relatives, subject, in all cases, to the rules and regulations prescribed by the statutes. Willard on Real Estate, 326.

163. What is the first rule of descent?

The first rule of descent is, that, if the intestate shall leave several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, as tenants in common, however remote from the intestate the common degree of consanguinity may be. Willard on Real Estate, 326; 4 Kent's Com. 375.

164. What is the second rule of descent?

The second rule of descent provides that, if any of the

children of the intestate be living and any be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as have died, as tenants in common, so that each child, who shall be living, shall inherit such share as would have descended to him if all the children of the intestate who shall have died leaving issue had been living; and so that the descendants of each child who shall be dead shall inherit the share which their parent would have received if living. 1 R. S. 751, §§ 3, 17; Willard on Real Estate, 328; 4 Kent's Com. 390.

165. *If a father dies intestate, leaving two sons, and two grandsons, the children of a deceased daughter, what part of the estate will each inherit, under the second rule of descent?*

The two sons would each inherit one-third of the estate, and the two grandsons would inherit what would have descended to their mother had she been living, viz., one-third part of the entire estate, or each one-sixth of the same. 1 R. S., 751, § 4; Willard on Real Estate, 329.

166. *State generally the third rule of descent.*

The third rule of descent provides that, in case the intestate shall die without lawful descendants, the estate shall go to the parents; to the father first, if he be capable of taking the estate; otherwise, to the mother; the quantity of the estate so taken, as whether in fee or for life, depending upon whether there are brothers or sisters of the intestate living, or descendants of the same, to take the reversion or not. 1 R. S., 751, § 5; Willard on Real Estate, 330; 4 Kent's Com. 393.

167. *In what cases will the estate descend upon the father?*

If the intestate died without lawful descendants, leaving a father, then the inheritance will go to the father, unless the inheritance came to the intestate on the part of his mother, and the mother be living; but if the mother be dead, the inheritance descending on her part will go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relations. If there are no such brothers or

sisters, or their descendants living, the inheritance will descend to the father in fee. 1 R. S. 751, § 5; Willard on Real Estate, 330.

168. In what case will the inheritance descend to the mother?

In case the intestate dies without lineal descendants and leaving no father, or leaving a father not entitled to take the inheritance, and leaving a mother and a brother or sister, or the descendant of a brother or sister, the inheritance will descend to the mother of the intestate during her life, and the reversion to such brothers and sisters of the intestate as may be living, or the descendants of such as may be dead. If the intestate leaves no brothers or sisters, or any descendants of such brothers or sisters, the inheritance will descend to the mother in fee. 1 R. S. 752, § 6; Willard on Real Estate, 331.

169. What is the fourth rule of descent?

Where the intestate leaves no descendants, and no father or mother capable of inheriting the estate, it will descend to the collateral relations of the intestate; and if there are several of such relatives, all of equal degree of consanguinity to the intestate, the inheritance will descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be. 1 R. S. 752, § 7; Willard on Real Estate, 332; 4 Kent's Com. 400.

170. If A dies intestate, leaving no lineal descendant and no father or mother, but leaving a sister and two sons of a deceased brother, who will inherit his estate?

One-half of the estate will descend to the sister and the remaining half will descend to the two sons of the deceased brother of the intestate, each of whom will receive one-fourth of the estate. Willard on Real Estate, 332; 1 R. S. 752, § 8.

171. When a person dies intestate, leaving no lineal descendants, parents, brothers, sisters or their descendants, what is the first question to settle in determining to whom the estate will descend?

The first question to settle is the source from which the

intestate derived his estate, as on the determination of that question will depend whether his estate will descend to the brothers and sisters of the father in preference to those of the mother, or to those of the mother in preference to those of the father, or whether the brothers and sisters of both father and mother shall inherit, without preference to either.

172. *What is the rule of descent where the testator dies, leaving no lineal descendants, parents, brothers, sisters or their descendants, and the inheritance came to the intestate on the part of his father?*

In that case, the inheritance descends : (1) To the brothers and sisters of the father of the intestate in equal shares, if all be living ; (2) If any be living, and any shall have died leaving issue, then to such brothers and sisters as shall be living, and to the descendants of such brothers and sisters as shall be dead ; (3) If all such brothers and sisters shall have died, then to their descendants ; (4) In default of any such persons to take the inheritance, it descends to the brothers and sisters of the mother of the intestate and their descendants, in the same manner as it would have descended to the like relatives of the father. 1 R. S. 752, §§ 10, 11 ; Willard on Real Estate, 334 ; 4 Kent's Com. 409.

173. *What is the rule in a like case, except that the inheritance came to the intestate on the part of the mother?*

In that case the inheritance goes to the brothers and sisters of the mother of the testator, and their descendants, and not to those of the father, unless there are no brothers or sisters of the mother, and no descendants of the same, in which case the inheritance would go to the brothers and sisters of the father and their descendants. 1 R. S. 753, § 12 ; Willard on Real Estate, 334 ; 4 Kent's Com. 409.

174. *What would be the rule in the two cases last given, if, instead of the inheritance coming to the intestate on the part of either father or mother, it had come from other sources?*

In that case it will descend to the brothers and sisters, both of the father and mother of the intestate, in equal shares,

and to their descendants, in the same manner as if all such brothers and sisters had been brothers and sisters of the intestate. 1 R. S. 753, § 13; Willard on Real Estate, 334.

175. What is the rule of descent, in relation to relatives of the half blood?

The relatives of the half blood inherit equally with those of the whole blood in the same degree, and the descendants of such relatives inherit in the same manner as descendants of the whole blood, *unless* the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor are excluded from the inheritance. 1 R. S. 753, § 15; Willard on Real Estate, 334.

176. What is the rule of descent, in case an illegitimate dies intestate?

Where an illegitimate dies intestate, his estate descends to his lineal descendants, if he has any; if he has no descendants, then to his mother; or, if she be dead, it then descends to the relatives of the intestate, on the part of the mother, as if the intestate had been legitimate. Willard on Real Estate, 335.

177. When may illegitimate children inherit from the mother?

When there is a default of legitimate issue. In other cases the common-law rule applies, and the bastard cannot inherit. Laws of 1855, ch. 547; Willard on Real Estate, 335.

178. In case none of the rules of descent are applicable to a given case, how is the question of descent to be determined?

By the rules of the common law. 1 R. S. 753, § 16; Willard on Real Estate, 335; 4 Kent's Com. 410.

179. What is the distinction between a title by purchase and a title by descent?

A person is said to acquire his title by descent when it comes to him by operation of law, as when it descends to the son on the death of the father. If it is acquired in any other manner, it is said to be acquired by purchase, as where it is de-

vised by will, etc. Willard on Real Estate, 344; 4 Kent's Com. 423.

180. In what cases will the title to lands revert or escheat to the State?

(1) When the tenant in fee dies seized, leaving no heir capable of inheriting the property, and having made no valid disposition of it by will; (2) When lands are purchased by an alien, who cannot hold as against the State. Willard on Real Estate, 344; Bingham on Real Estate, 19.

181. What is a title by prescription?

It is a right to the undisturbed possession of land which the law gives to any person who has had continuous and peaceable usage and enjoyment of land for twenty years, under a claim of right, and with the acquiescence and knowledge of the owner. Willard on Real Estate, 350.

182. How does the law protect the possession of land by a party who has acquired title by prescription?

By taking away from all others the right to maintain an action to recover the possession of lands so held. Willard on Real Estate, 347; Wait's Code, 99, § 78.

183. When will premises be deemed to have been held adversely under a written instrument or judgment?

Land is deemed to have been occupied adversely whenever it appears that the occupant, or those under whom he claims, entered into possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for twenty years. But where a tract is divided into lots, the possession of one lot will not be deemed the possession of any other lot of the same tract. Wait's Code, 100, § 82.

184. What must be the character or nature of the possession or occupancy to constitute adverse possession in such cases?

For the purpose of constituting adverse possession, by a

person claiming title founded upon a written instrument, or a judgment or decree, land is deemed possessed and occupied : (1) Where it has been usually cultivated or improved ; (2) Where it has been protected by a substantial inclosure ; (3) Where though not inclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary uses of the occupant ; (4) Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country will be deemed to have been occupied for the same length of time as the part improved and cultivated. Wait's Code, 100, § 83.

185. *What premises will be deemed to have been held adversely where the occupation has been under a claim of title not founded upon a written instrument, or a judgment or decree of a court ?*

The premises actually occupied, and no other. Wait's Code, 101, § 84.

186. *What must be the nature of the possession or occupancy of the premises in such cases to sustain a claim of adverse possession ?*

Land will be deemed to have been possessed and occupied only : (1) Where it has been protected by a substantial inclosure ; (2) Where it has been usually cultivated and improved. Wait's Code, 101, § 85; Willard on Real Estate, 355.

187. *Upon what principle does the statute of limitation deny one individual the right to commence an action to recover the possession of lands which another has held adversely for twenty years or over ?*

Upon the principle that the party in possession has accompanied his adverse claim by such an invasion of the rights of the opposite party as to give him a cause of action, which, having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. Tyler on Ejectment and Adverse Enjoyment, 859.

188. *A, under a license from B, entered upon the land of the latter and constructed a dam, which, after keeping in repair for more than twenty years, he conveyed to C: Has C acquired any right in the property so conveyed as against B?*

He has not, for the reason that A had no right which he could convey. No person holding land under a license from the true owner can set up adverse possession against such owner, and the same rule applies to his grantee. The license given to A was not conveyed to C, as a license is a mere personal right not susceptible of conveyance. Tyler on Ejectment and Adverse Enjoyment, 880.

189. *A leased certain lands of B, for a term of five years, and on the expiration of his term held over, claiming to hold the premises under a title adverse to that of his landlord. B allowed A to remain in peaceable possession for fifteen years after the expiration of his term, without any demand of rent, and then brought an action to recover possession of the premises. Can A defeat a recovery by reason of adverse possession?*

He cannot. His possession is presumptively the possession of his landlord until the expiration of twenty years from the termination of his tenancy, notwithstanding that he may have acquired another title, or may have claimed to hold adversely to his landlord. Wait's Code, 101, § 86; Tyler on Ejectment and Adverse Enjoyment, 880; Willard on Real Estate, 358.

190. *In what cases will the adverse occupation and possession of lands, for a period of twenty years, fail to bar the recovery of the possession of the same by the rightful owner?*

Where the owner of lands is under a disability at the time his title thereto shall first descend or accrue, he may commence an action to recover their possession at any time within ten years after his disability shall cease, regardless of the length of time that the adverse party may have held such lands adversely. Wait's Code, 102, § 88. Willard on Real Estate, 358.

191. *A, at the age of eleven years, acquired title to land by devise from his father; B, at the same time, entered upon the land claiming to hold it by a superior title. Five years after arriving at his majority A died, leaving a son who took the estate by descent; and on arriving at his majority commenced an action against B to recover possession of the land which B had continued to hold adversely. Can the action be maintained?*

It cannot. It should have been commenced within ten years from the time when A's disability ceased by his becoming of age. The law does not allow successive disabilities to different persons taking the same estate by devise or descent from the other; and where an adverse possession begins to run in the life-time of the ancestor, it continues to run though the land descends to a person under a disability. Tyler on Ejectment and Adverse Enjoyment, 931; Willard on Real Estate, 359.

192. *A, claiming title to land which B held adversely, conveyed it to C, who within twenty years from the time when B went into possession, commenced an action to recover possession of the land so held. Can he recover?*

He cannot. A's grant to C being void, C has no title to the land upon which to base his action. Willard on Real Estate, 360.

193. *What is the only restraint upon the alienation of real property in this State?*

The statute declaring void every grant of land that at the time of the delivery thereof, is in the actual possession of a person claiming under a title adverse to that of the grantor. 1 R. S. 739, § 147; Willard on Real Estate, 370.

194. *What is a deed?*

It is a writing sealed and delivered by the parties. 2 Bl. Com. 295; 4 Kent's Com. 452. In common parlance the conveyance by which the title to freehold estates are conveyed from one person to another are denominated "deeds," although the statutes apply the name of "grant" to such conveyances. Willard on Real Estate, 374.

195. What are the requisites of a valid deed?

1. Parties who are able to contract ; 2. Subject-matter.
3. A good and sufficient consideration. 4. That it be written or printed on paper or parchment. 5. That the matter be legally and orderly set forth. 6. That it be read if desired.
7. That it be signed and sealed. 8. That it be acknowledged or attested by witnesses. 9. That it be delivered. 10. That it be recorded in the proper county and in the proper book. Willard on Real Estate, 376 ; Bingham on Real Estate, 74 ; 2 Bl. Com. 296-308.

196. Is it necessary to express the consideration in the deed?

: It is not strictly necessary, but it is always advisable to do so. Willard on Real Estate, 379.

197. What are the formal parts of a deed?

They are, 1. The *premises*, setting forth the names of the parties, grantor and grantee, together with their place of abode or other matter of description ; the recital of any facts necessary to explain the object of the deed ; the consideration and its receipt ; the grant and a description of the thing granted. 2. The *habendum* and *tenendum*, the office of which is to set ~~the~~ the kind of estate which is granted, for what time and the tenure ~~in~~ upon which it is held. 3. The *redendum*, or reservation upon which the grant is made. 4. The *condition*, on the happening of which the estate granted may be defeated. 5. The *warranty*. 6. The *covenants*. 7. The *conclusion*, giving the execution and date of the deed if it has not been already inserted. Willard on Real Estate, 381 ; 2 Bl. Com. 297-304 ; 4 Kent's Com. 460.

198. What is a seal?

A seal is a wax or wafer with an impression. A piece of paper attached to the instrument by a wafer is a good seal while the letters "L. S." which in some States are used in place of a seal would not be valid as such here. Bingham on Real Estate, 74 ; Willard on Real Estate, 382.

199. From what time does a deed take effect?

From its delivery and not from its date. Willard on Real Estate, 384 ; Bingham on Real Estate, 214 ; 4 Kent's Com. 454.

200. How, or in what manner, must a deed be delivered?

No particular form is essential to a valid delivery of a deed. It is only essential that the acts of the parties should clearly evince such an intent. But it is the better practice to use such language at the time of handing the deed to the grantee as will leave the intent of the parties beyond doubt. Willard on Real Estate, 384; Bingham on Real Estate, 216.

201. What is an escrow?

When a deed is not delivered absolutely but conditionally—that is, not to the grantee himself or to some person for him, but to a third person to keep until something is done by the grantee—it is said to be delivered, not as a deed, but as an *escrow*, *i. e.*, as a *scrawl* or writing, which is not to take effect until the condition is performed, when it becomes a good deed. Willard on Real Estate, 385; Bingham on Real Estate, 224; 4 Kent's Com. 451, 454.

202. Is it necessary to the validity of a deed that it should in any case be read over to the parties?

It is necessary that a deed should be read before its execution when any of the parties desire it; and if this be not done it is void as to him. Willard on Real Estate, 382.

203. How must freehold property be conveyed by a corporation?

By deed, under the corporate name and seal, unless certain officers are authorized by the act of incorporation to convey in their own names. Willard on Real Estate, 383.

204. Who is a subscribing witness?

One who was present when the deed was executed, and who *at that time* subscribed his name as a witness of the execution; or, one who was not present at the moment of the execution, but was called in by the parties immediately afterward, and who, on their acknowledgment that the instrument is their deed, subscribes it as a witness to that fact at their request. Willard on Real Estate, 387.

205. Before whom may a deed be acknowledged or proved?

It may be acknowledged or proved before any of the jus-

tices of the supreme court, judges of county courts, mayors, and recorders of cities, or justices of the peace of towns. Willard on Real Estate, 389. *Notary, Commissioner of Deeds.*

206. When is proof of the identity of the person executing the deed, and of the person making the acknowledgment, necessary?

Whenever the officer taking the acknowledgment does not know that the person making the same is the person described in and who executed the deed. Willard on Real Estate, 390.

207. When is it necessary that a married woman should acknowledge the execution of a deed "on a private examination apart from her husband?"

When she joins in a conveyance of the real estate of her husband for the purpose of barring her right of dower therein, but not when she conveys real property, held by her as her separate estate. Willard on Real Estate, 391.

208. What is the effect of a failure to record a deed?

The effect of not recording a deed will be to render it void, as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded. Willard on Real Estate, 396; 1 R. S. 756, § 1.

209. What effect does the alteration of a deed, after its execution, have upon the validity of the deed itself and upon the title to the estate conveyed by it?

The alteration of a deed by a stranger, without the consent or privity of the parties, will not render the deed void, if the contents of the deed, as it originally existed, can be ascertained. But the fraudulent alteration of a deed by the grantee will render the deed void, so that the grantee cannot recover in any action founded upon it. The title to the estate conveyed will, in either case, remain in the grantee, and the cancellation or destruction of the deed will not revest the title in the grantor. Willard on Real Estate, 400.

210. *If A conveys to B all of a certain piece and parcel of land, known and distinguished on a certain map as lot No. —, containing three and one-half acres, how much land will pass to B, if the lot designated contained twenty acres?*

Twenty acres, or the entire lot. Willard on Real Estate, 405.

211. *If A grants to B lands lying between certain natural boundaries, which are permanent and well known, but fails to correctly describe, in his deed, the courses and distances from one of such known objects to the others, which will control, the natural or artificial boundaries?*

The natural boundaries, and the courses and distances must be varied to conform to them. Willard on Real Estate, 405.

212. *If A, being seized of an estate in fee, transfers his whole right, by a deed of conveyance, to B, does A thereby create an estate?*

He does not. The deed is, in effect, an assignment by which an existing estate is transferred, but by which no new estate is created. Bingham on Real Estate, 13, 125.

213. *Can any person create an estate in fee?*

An individual cannot create an estate in fee, as the power to create such estates is vested exclusively in the State. Bingham on Real Estate, 105.

214. *Define what is meant by the legal term "covenant."*

A covenant is a kind of promise contained in a deed to do a direct act, or to omit one, and is a species of express contract, the breach of which is a civil injury. The person who makes such a covenant is called the *covenantor*, and he, to whom it is made, is called the *covenantee*. Willard on Real Estate, 411; Bingham on Real Estate, 384.

215. *What is meant by the term "a covenant running with the land?"*

A covenant is said to run with the land, when either the liability to perform it, or the right to take advantage of it,

passes to the assignee of the land. Covenants for quiet enjoyment, for further assurance, to repair, to pay rent and taxes, to yield up possession, etc., are covenants running with the land. Willard on Real Estate, 415, 417; Bingham on Real Estate, 399.

216. What are the incidents necessary to make a covenant run with the land?

The covenant must : (1) Directly extend or relate to the land conveyed or demised ; (2) There must be a privity of estate between the covenanting parties ; (3) The owner of the property must take the legal estate. Willard on Real Estate, 415-419 ; Bingham on Real Estate, 400.

217. Are any covenants implied in a conveyance of real estate?

At common law, in the absence of express covenants, certain covenants would be implied ; but the Revised Statutes provide that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. Willard on Real Estate, 411.

218. When a person seized in fee conveys all his estate to a purchaser, what covenants are usually entered into by the vendor?

The vendor usually covenants : (1) That he is seized in fee ; (2) That he has power to convey ; (3) For quiet enjoyment by the purchaser ; (4) That the estate is free from incumbrances ; (5) For further assurance, and (6) That the vendor will forever warrant and defend. Willard on Real Estate, 412 ; 4 Kent's Com. 471.

219. What is a lease?

A lease is properly a conveyance of lands or tenements (usually in consideration of rent or other annual recompense,) made for life, for years, or at will, but always for a less time than the lessor has in the premises ; for if it be for the whole interest, it is more properly an assignment of a lease. Willard on Real Estate, 423.

220. *What leases are by the statute of frauds required to be in writing?*

All leases for more than one year. Willard on Real Estate, 425.

221. *What is the longest term for which agricultural land can be leased?*

No valid lease of agricultural lands can be made for a longer term than twelve years if it reserves any rent or service of any kind. Willard on Real Estate, 432.

222. *What is an interesse termini, and is it assignable?*

An *interesse termini* is that species of property or interest which a lessee for years acquires in the lands demised to him before he has actually become possessed of them by entry. It may be granted over to another, or may be extinguished by release. Bingham on Real Estate, 227, 230.

223. *What are the appropriate words for creating a lease?*

Any words, showing the intention of the parties, are sufficient; but the proper words are "*demise, lease, and to farm let.*" Willard on Real Estate, 423.

224. *What are appropriate words for creating an assignment?*

The terms usually employed are "*assign, transfer and set over;*" but any other words that show the intent of the parties will have a like effect. Willard on Real Estate, 439.

225. *What is a defeasance?*

A collateral deed made at the same time with some other principal deed or instrument and containing certain conditions, on the performance of which the intentions of the principal deed may be defeated or rendered null and void. Willard on Real Estate, 440.

226. *In what cases is the order or authority of a court necessary, to enable the owner of real estate to convey the fee?*

1. Where the owner is a religious corporation; or, 2. An infant; or, 3. An idiot, lunatic or habitual drunkard,

against whom a commission has been awarded and whose estate has been put in the hands of a committee. Willard on Real Estate, 445.

227. *Within what time and upon what terms may a judgment debtor redeem real property sold by the sheriff under an execution?*

He may redeem such property within one year from the time of sale, by paying to the purchaser, his personal representatives, or the officer who made the sale, the amount bid on the land he desires to redeem, together with the interest thereon from the time of sale, at the rate of ten per cent per annum. Willard on Real Estate, 459.

228. *Is this right of redemption confined to the judgment debtor?*

It is not. It may be exercised by the grantee of the judgment debtor, who has by any means acquired an absolute title to the premises sold; or, in case of the death of the judgment debtor, by his devisee or heir. Willard on Real Estate, 459.

229. *In what cases, and within what time, may a creditor of the judgment debtor redeem the real estate of such debtor after its sale by the sheriff under an execution?*

Any creditor, having a judgment or decree rendered within fifteen months from the time of sale, or having a mortgage duly recorded within that time, which is a lien and charge upon the premises sold, may, on the failure of the debtor to redeem within the year, acquire all the rights of the original purchaser, by paying the amount paid for the premises, with interest at seven per cent from the time of sale. This right can be exercised only within the three months after the expiration of the year from the time of sale. Willard on Real Estate, 460.

230. *What is the nature of the interest which the purchaser and the judgment debtor have, respectively, in the lands sold under an execution, during the fifteen months immediately succeeding the sale?*

Until the expiration of the fifteen months following the

time of sale, the title to the land is still vested in the debtor, and the purchaser has only a lien. But, after the expiration of that time, and on the execution of a deed by the sheriff, the purchaser becomes vested with the legal estate relating back to the time of the sale on the execution. Willard on Real Estate, 462.

231. What do you understand by the right of eminent domain?

It is the ultimate right of the State to appropriate to public purposes, not only the public property, but the private property of all persons within its territorial limits. Willard on Real Estate, 464.

232. What limit is there to the right of the State to appropriate private property for public purposes?

The constitution of the State, while recognizing the right as existing, provides that private property shall not be taken for public use without just compensation. Willard on Real Estate, 465.

233. If your client was about to purchase a certain parcel of land, and wished you to prepare an abstract of the title, how far back would you deem it necessary to carry your search for judgments against the vendor?

A search for judgments against the vendor need not go back over a period greater than ten years; as, from and after ten years from the time of docketing, they cease to be a charge upon land, as against purchasers in good faith. Willard on Real Estate, 529.

234. In case the search discloses judgments against the vendor, docketed within ten years, and undischarged of record, but which are known to have been paid, what is the proper course for the purchaser to pursue?

He should cause satisfaction to be acknowledged by the judgment creditor, and to have the docket of the judgment canceled and discharged by the clerk of the court. Willard on Real Estate, 533.

235. *Is it necessary to notice, in an abstract of title, any mortgages of the land to be conveyed which are not recorded?*

It is not, as a *bona fide* purchaser of land, without notice of a prior unrecorded mortgage, holds the land discharged of its lien. Willard on Real Estate, 121.

236. *Mention some of the principal things to be noticed, in making an abstract of title, where the party intending to sell or mortgage the premises in question derived his title thereto by descent.*

The principal things to be considered are such matters as relate to the title of the ancestor, and the right of the vendor by descent. The period over which the search of the title of the ancestor should extend is to be determined by circumstances. The search should disclose whether there are any vested or contingent rights to dower which have not been released or discharged ; whether the vendor is the legitimate heir of the former owner ; whether there are any other heirs to the inheritance who have not conveyed their share of the same to the vendor ; and whether there are any outstanding terms for years, created by prior parties, still subsisting. Willard on Real Estate, 539-541.

237. *What should be the nature of the inquiry, in making an abstract of a title derived by devise?*

In addition to the usual search for judgments and mortgages, there should be an investigation of the manner in which the will was executed ; whether it has been proved as a will of real estate, and properly recorded ; whether the testator has devised the fee simple to the vendor, or otherwise ; whether the testator's debts and legacies have been charged upon the real estate ; and whether there is still any outstanding claim for dower, affecting the premises. Willard on Real Estate, 541.

238. *When an estate in lands is transferred from a vendor to a vendee, who is entitled to the original deeds?*

If the vendor conveys the entire lot, of which he has the title, by a conveyance in fee, without any covenants of warranty, the title deeds should go to the grantee, as an incident

of the grant; but if the vendor conveys only a part of his estate, and retains the balance himself, the vendee is not entitled to the deeds, unless they are expressly granted to him by the terms of the conveyance. Willard on Real Estate, 547.

239. Who should be at the expense of preparing the title deeds and making the requisite searches for incumbrances?

In the absence of any agreement in the matter, it is the duty of the vendor to prepare the title deeds, at his own expense, and likewise to make the requisite searches for incumbrances. Willard on Real Estate, 562.

CHAPTER VI.

PERSONAL PROPERTY.

1. What do you understand by the term "personal property?"

It is a term usually employed to designate all things temporary and movable, and such as are comprehended under the general word *chattel*. All property not of a freehold nature, and descendible to the heirs at law, is so denominated. 2 Kent's Com. 340; 2 Bl. Com. 384.

2. What is the definition of personal property given in the Code of Procedure?

The words "personal property," as used in that act, are declared to include money, goods, chattels, things in action, and evidences of debt. Wait's Code, 801, § 463.

3. What is a chattel?

Chattel is a general term applied in law to every species of property which is not real estate or freehold. 2 Bl. Com. 385; 2 Kent's Com. 342.

4. What is the distinction between a chattel real and a chattel personal?

Chattels real are interests issuing out of or annexed to

real estates, and partake of one quality of such estates, viz., immobility, which denominates them real, but lack the other, viz., a sufficient, legal, indeterminate duration, and hence are termed chattels. Chattels personal, on the contrary, lack that immobility which distinguishes chattels real, and are, strictly speaking, things *movable*, which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. 2 Bl. Com. 387.

5. How is property, in things personal, divided?

Into property in *possession* and property in *action*. And property in possession is again divided into *absolute* and *qualified* property. 2 Bl. Com. 388; 2 Kent's Com. 347.

6. What do you understand by absolute property in a chattel?

Absolute property denotes such a sole and exclusive right and occupation of any movable chattel that its control and ownership cannot be separated from its possessor without some act or default of his own. It is that property which a man has in inanimate things, as goods, money, etc., or in domestic animals, as horses, sheep, and the like. 2 Bl. Com. 388; 2 Kent's Com. 347.

7. What is a qualified property in a chattel?

It is a transient, special or conditional interest or right in a chattel which may be divested by the happening of some particular event, and without the concurrence and consent of the party having such right or interest. The lawful possession and occupation of a chattel or thing, not coupled with the power to render such possession and occupancy permanent, are the characteristics of this species of property. 2 Bl. Com. 391; 2 Kent's Com. 347-350.

8. From what circumstances may the qualified character of property in a thing or chattel arise?

It may arise from the nature of the thing possessed, or it may arise from the nature of the title by which it is held. Thus, a person can have only a qualified ownership or property in the elements of air, light, water, etc., as the property in them

ceases when they are out of possession. So a person can have only a qualified property in goods bailed to him, as his property may be defeated at any time by the act of the bailor. 2 Bl. Com. 395; 2 Kent's Com. 347-350.

9. What is meant by the term *chose in action*?

A *chose in action* is a phrase which is sometimes used to signify the right of bringing an action, and in other cases is used to denote the thing itself which forms the subject-matter of the right, or with regard to which that right is exercised; but it more properly includes the idea of the thing itself, and the right of action as annexed to it. 2 Bl. Com. 396; 2 Kent's Com. 351.

10. May personal property be held in joint tenancy or in tenancy in common?

It may. When held in joint tenancy, the right of survivorship applies, as in case of joint tenancy in lands. But, for the encouragement of husbandry and trade, it is held that stock on a farm, though occupied jointly, and also stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common, and not as joint property, and that the doctrine of survivorship shall not apply thereto. 2 Bl. Com. 399; 2 Kent's Com. 350.

11. How may title to personal property be acquired?

It may be acquired: (1) By original acquisition; (2) By transfer by operation of law; (3) By transfer by act of the parties. 2 Kent's Com. 355.

12. What do you understand by "occupancy," and "title by occupancy?"

Occupancy is the taking possession of those things which before belonged to no one. Title by occupancy is that right to continued possession that arises from such taking. Title by occupancy may also be acquired in goods formerly owned by another, where the former owner has completely relinquished them. The cases in which title by occupancy can be now acquired are exceedingly limited, as compared with those under former rules. 2 Bl. Com. 258, 400; 2 Kent's Com. 356.

13. *If A cuts down the trees of B and converts them into shingles, in whom is the property in the shingles vested?*

In B, if he can prove the fact that the shingles were manufactured from his trees. In that case B acquires title to the property in its improved form *by accession*, which is a title founded upon the right of occupancy. 2 Bl. Com. 404; 2 Kent's Com. 360.

14. *If A and B have each grain, of different qualities and value, stored in the same building, and separated by only a slight partition, and A causes this partition to give way, in order that his grain may become mixed with that of B, which is of better quality, by what means may B protect himself against loss and recover his own grain again?*

B's remedy is to take the entire grain stored, and dispose of it as he deems best. By fraudulently intermixing his grain with that of B, so that it cannot be distinguished, A has lost, and B has gained, the property which A had in the grain; and A is entitled to no compensation from B for the property so taken. 2 Kent's Com. 364; 2 Bl. Com. 405.

15. *By what right does B acquire title in the grain of A, in the case given?*

By the right of accession. 2 Kent's Com. 360.

16. *If a partition, separating the grain of two several owners, should fall by reason of lack of skill in its construction, and without fault in either party, and the grain should become so intermixed that it could not be distinguished, in whom would be the right of property in the grain?*

In both the original owners, as tenants in common. 2 Kent's Com. 364, 365; 2 Bl. Com. 405.

17. *What would be the rule if goods, fraudulently mixed by one owner with those of another, still retain their identity so that they can be equally separated and distinguished?*

In that case no change of property takes place; but it is for the party guilty of the fraud to distinguish his goods satisfactorily, as no court of justice is bound to discriminate for him. 2 Kent's Com. 264, 265.

18. Has an author, at common law, any exclusive property in his published works?

He has not. An author has, at common law, an exclusive property in his unpublished manuscript, but none whatever in printed copies of the same, if published with his consent. By publication they become common property, subject to the free use of the community at large. In this country, an author's exclusive right of literary property in his published works depends upon the acts of congress of 1790 and 1802, and in England upon the statute 8 Anne, ch. 19, and subsequent statutes. 2 Kent's Com. 367, note; 2 Bl. Com. 407.

19. What is a patent?

It is a grant, by the State, of the exclusive privilege of making, using and vending, and authorizing others to make, use and vend, an invention. 2 Kent's Com. 366.

20. Who may obtain a patent in this country?

Any person, being a citizen of the United States, or any alien residing in the United States at the time of his application, having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his discovery or invention thereof, and not, at the time of his application for a patent, in public use or sale, with his consent or allowance as the inventor or discoverer, may obtain a patent for the same by conforming, in his application, to the requirements of the law. 2 Kent's Com. 366, 367.

21. Is a patent right assignable, and is such right liable to sale on execution?

The right is assignable, but is not liable to sale on execution, although the article patented may be so seized and sold. 2 Kent's Com. 372.

22. What is the rule in respect to the right to the exclusive use of trade-marks?

Every manufacturer and every merchant for whom goods are manufactured, has a right to distinguish his goods by an

appropriate and particular mark or device, and the courts will protect him in the exclusive use of such device or trade-mark, and grant injunctive orders restraining the use of such trade-mark by others. 2 Kent's Com. 372, *note*; Wait's Code, 383, *note d.*

23. Has the writer of a letter such a property in it as will entitle him to an injunction to restrain its publication, by the person to whom it is addressed, or strangers who have acquired possession of it?

He has. *Woolsey v. Judd*, 11 How. 49; S. C., 4 Duer, 379; Wait's Code, 385.

24. When is the title to personal property transferred by act of law?

In cases of forfeiture, succession, marriage, judgment, insolvency and intestacy. 2 Kent's Com. 385.

25. In what cases may government acquire the property of citizens by forfeiture?

In New York, the right of the State to acquire the property of individuals, by forfeiture, is limited to those cases in which the individuals whose property has been taken have been convicted of treason, and even in those cases the right continues only during the lives of the persons so convicted. The right of forfeiture in this country is purely statutory. 2 Kent's Com. 385, 386.

26. In what cases will the recovery of a judgment effect a change of title?

In cases where the owner of a chattel has brought an action of trespass or trover against one unlawfully in possession, or where, waiving the tort, he has brought his action to recover the price or value of the thing taken. In either case the recovery of a judgment by the plaintiff, while it vests a title to the damages in the plaintiff, at the same time operates as a transfer to the defendant of the plaintiff's title to the chattel, concerning which the cause of action arose. 2 Kent's Com. 387-389; 2 Bl. Com. 436.

27. In what cases may title to personal property be acquired by intestacy?

Where a person dies, leaving personal property undisposed of by will. In such cases the widow, and next of kin, acquire title to so much of the personal estate of the intestate as remains after payment of the debts of the intestate. 2 Kent's Com. 408.

28. What is essential to a transfer of title to personal property by parol gift?

Delivery of the chattel or *chose in action* to the donee. The delivery must be actual, if the thing given is capable of delivery ; and, if otherwise, there must be some act equivalent to actual delivery, showing the intent of the donor to part, not only with the possession, but also with the dominion of the property. 2 Kent's Com. 439.

CHAPTER VII.

CONTRACTS.

1. What is a contract?

A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing. 1 Pars. on Cont. 6; 2 Bl. Com. 446; 1 Wait's Law & Pr. 81.

2. Give the general classification of contracts?

Every contract must belong to one of two classes, viz.: contracts by specialty or simple contracts. The first class includes contracts under seal and contracts of record, and the second class includes all others. Contracts are also distinguished as written or parol, express or implied, executed or executory. 1 Pars. on Cont. 7; 1 Wait's Law & Pr. 82.

3. Give the distinction between an executed and an executory contract?

An executory contract is one whose subject-matter is to

be performed on the part of one or both of the parties at some future time, while an executed contract is one whose subject-matter has been fully performed. A contract may be executed as to one of the parties, and executory as to the other ; as where goods are sold on credit, and delivered at the time of sale. 1 Wait's Law & Pr. 82.

4. What are the essentials of every valid contract ?

1. Parties who have a legal capacity to contract ; 2. A sufficient legal consideration ; 3. The assent of the parties ; and 4. Subject-matter, or thing to be done, which must be in itself a legal act. 1 Wait's Law & Pr. 81 ; 1 Pars. on Cont. 9.

5. Who are wholly, or in part, incapable of making a valid contract ?

Infants, married women, lunatics, idiots, and all persons temporarily or permanently of unsound mind. 1 Wait's Law & Pr. 84 ; 1 Pars. on Cont. 9.

6. What was the rule of the common law in respect to contracts made by married women during coverture ?

At common law all contracts made by a married woman during coverture were, with a few exceptions, absolutely void. She could neither bind herself or her husband by her contract ; neither could she, by virtue of her contract, acquire to herself, and for her exclusive benefit, any right or property. Tyler on Inf. & Cov. 313 ; Reeve's Dom. Rel. 182 ; 1 Pars. on Cont. 345.

7. What changes have been effected in this rule of the common law by recent statutes ?

By the acts of 1848 and 1849, the common-law rule was so far relaxed as to permit a married woman to acquire an estate separate from her husband's, and to hold it for her own benefit. By the act of 1860, she was empowered to sell, assign and transfer her separate personal property ; and, by the act of 1862, she was authorized to bargain, sell and convey real property held by her as a separate estate, and to enter into any contract in reference to the same, with the like effect in

all respects as if she were unmarried. See 1 Wait's Law & Pr. 660; Reeve's Dom. Rel. 19, 50; Tyler on Inf. & Cov. 636.

8. Can a wife, under existing statutes, make any contract in respect to her sole and separate property which shall be binding upon her husband, or which shall render him or his property liable therefor?

She cannot. 1 Wait's Law & Pr. 666; Laws of 1860, ch. 90, § 8, as amended by Laws of 1862, ch. 172, § 4.

9. Upon what does the liability of a married woman, upon her contract, depend under existing statutes?

The liability of a married woman, upon her contract, may depend either upon the subject-matter or the form of the contract. She will be liable if the act to be done or omitted, which forms the subject-matter of the contract, is for the benefit of her separate estate; or, if she expresses, in writing, an intent to make the performance of her contract a charge upon her separate estate. Tyler on Inf. & Cov. 654; Wait's Code, 218; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. (3 Hand) 613; *Shorter v. Nellson*, 4 Lans. 114.

10. B, in the presence of his wife, enters into a contract with C for the erection of certain buildings upon land which B claims to own; but which, in fact, forms part of the separate estate of his wife. On the completion of his contract C takes the note of B for the balance due on the contract. Can C, after the maturity and dishonor of the note, recover in an action against the wife for work, labor and materials expended upon her separate estate?

He cannot. The wife is not chargeable, either in law or in equity, for improvements made upon her separate estate under her husband's contracts. *Ainsley v. Mead*, 3 Lans. 116.

11. Does the law make any distinction between a conveyance of real estate by deed, from the wife to the husband, and a similar conveyance from the husband to the wife, where the property conveyed is intended as a gift in presenti?

It does. The deed from the wife to the husband would be wholly void for want of consideration, while the deed from

the husband to the wife, though void at law, may be enforced in equity; as the duty of the husband to support the wife is a sufficient consideration to uphold the gift, except as against creditors. *Hunt v. Johnson*, 44 N. Y. (5 Hand) 27.

12. What is the general rule, respecting the validity of contracts made by an infant?

Every contract entered into by an infant is either absolutely void, or voidable at the election of the infant. If, from the nature of the case, it is impossible that an infant's contract can be for his benefit, it is absolutely void; but, if otherwise, it is voidable only. *Tyler on Inf. & Cov.* 48; *Reeve's Dom. Rel.* 374.

13. A party enters into a contract on the day previous to his twenty-first birth day, and afterward desires to avoid the contract; can he do so on the ground of infancy? Give the reason.

He cannot, for the reason that he was of full age at the time of entering into the contract. The law recognizes no parts of a day, and when the last day of an infant's minority begins it is considered as ending. *1 Wait's Law & Pr.* 888.

14. A, while an infant, enters into a contract for the purchase of real estate, and performs labor in part payment of the purchase price; on coming of age, he elects to avoid his contract, and brings an action to recover the value of his services on a quantum meruit; can he recover?

He can, provided that he has not received a conveyance of the land, nor had possession of it. *1 Wait's Law & Pr.* 889; *Reeve's Dom. Rel.* 364.

15. How would you determine whether the liability incurred upon a contract was joint or several, or such that it might be treated as either joint or several at the election of the other contracting party?

By the terms of the contract if they are express, otherwise by the intention of the parties as gathered from all the circumstances of the case. If the obligation is undertaken by two or more, the law will presume a joint liability in the

absence of words of severance showing a different intent. 1 Pars. on Cont. 11; 1 Wait's Law & Pr. 84.

16. *When a party has a right to elect whether he will treat a liability as joint, or joint and several, what is the rule as to the parties defendant in an action to enforce such liability?*

In an action to enforce a joint and several liability, the plaintiff must proceed either severally against each or jointly against all. He cannot treat the liability as several as to some of the obligors, and joint as to the rest. 1 Pars. on Cont. 12.

17. *Where two or more persons are jointly, or jointly and severally liable on a contract to pay money, and one of them pays the entire debt, what remedy has he as against his co-obligors?*

He has the right of contribution, or the right to recover from his co-obligors so much of the entire sum paid as is in excess of his share of the original liability. 1 Pars. on Cont. 31; 1 Wait's Law & Pr. 35.

18. *What is meant by the term nudum pactum, and what is the legal force of an instrument to which it may properly be applied?*

A promise to do or not to do a specified act, when made wholly without consideration, is called a *nudum pactum*. An agreement so made, whether written or parol, has no legal force or effect, and is wholly void. 1 Wait's Law & Pr. 85; 1 Pars. on Cont. 427.

19. *Can a contract under seal be impeached for want of a sufficient consideration?*

It can. The seal merely raises a presumption of the existence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the contract were unsealed. 1 Wait's Law & Pr. 108; 1 Pars. on Cont. 428.

20. *When is, and when is not a total want of consideration a perfect defense in an action upon a contract?*

The want of consideration is no defense in an action upon a negotiable promissory note or bill of exchange which has

passed into the hands of a *bona fide* holder for value before it became due. But in actions upon all other contracts, the want of consideration is a perfect defense. Edwards on Bills and Notes, 293; 1 Wait's Law & Pr. 108.

21. Define the different kinds of considerations known in law.

Considerations are either good or valuable. A valuable consideration is one which either is, or is convertible into money. Marriage is an apparent exception to the rule. A good consideration may consist wholly in natural love and affection, and be in no sense of a pecuniary character. 2 Bl. Com. 444; 1 Pars. on Cont. 430; 1 Wait's Law & Pr. 86.

22. A, being indebted to B upon two promissory notes, one of which is due and payable, offers to pay the note then due, on condition that B will extend the time of payment of the other, which offer B accepts; can B maintain an action against A on default in the payment of the second note at its maturity? or will the new agreement defeat the action?

The action can be maintained notwithstanding the new agreement, as the payment of a note then due would form no consideration for a promise to extend the time of payment of the other. 1 Wait's Law & Pr. 86.

23. Would the rights of the parties remain the same if, in the case above given, the agreement had been to extend the time of payment of a note already due, in consideration of the payment of the other note before its maturity?

They would not. The payment of a note before maturity would be a sufficient consideration for the promise to extend the time of payment of the other. 1 Wait's Law & Pr. 86.

24. What is essential to the legal sufficiency of a consideration for a promise?

It is essential that the party promising shall receive some benefit for his promise, or that the party to whom the promise is made shall suffer detriment thereby. If no detriment is suffered by the one, and no benefit is received by the other,

there is no consideration for the promise. 1 Wait's Law & Pr. 86 ; 1 Pars. on Cont. 431.

25. If a sufficient consideration in fact exists, is it essential that it shall be expressed in the contract?

Proof of the mere existence of a sufficient consideration will be sufficient to uphold a contract, unless such contract is one in which it is required by the statute of frauds that the consideration shall be express. 1 Wait's Law & Pr. 85 ; id. 635.

26. The right of action upon a debt due from A to B is barred by the statute of limitations; but A acknowledges his indebtedness, and promises to discharge the same at a specified time; can B enforce the new agreement, there being no new consideration for the promise?

B's right to recover depends upon the sufficiency of the evidence of a new or continuing contract, rather than upon the sufficiency of the consideration therefor. The statute of limitations does not discharge the indebtedness of A, but merely suspends the remedy of B, and a new promise will revive the original liability and continue it without a new consideration to uphold it. The Code, however, requires that to have this effect, such promise shall be contained in some writing signed by the party to be charged thereby. 1 Wait's Pr. 63 ; Wait's Code, 110, 111 ; 1 Wait's Law & Pr. 87 ; 1 Pars. on Cont. 434.

27. For the sum of one dollar, A agrees to convey to B a valuable farm: Will the inadequacy of the consideration affect B's right to recover in an action against A for a breach of the contract?

The inadequacy of the consideration cannot affect B's right to recover, although it may affect the amount of damages recoverable and the character of the relief to be obtained. A court of equity would not decree a specific performance of such a contract, nor would a court of law award more than reasonable damages. 1 Pars. on Cont. 436 ; 1 Wait's Law & Pr. 88.

28. *When will a compromise of a disputed claim for the purpose of avoiding litigation be deemed a good consideration for a promise to pay money?*

In every case in which the result of a litigation respecting such claim might be involved in doubt. But where the claim made shows upon its face that no legal liability could arise upon it, a promise to pay money to avoid the litigation of such claim will be void for want of consideration. 1 Wait's Law & Pr. 89, 90.

29. *What is essential to the validity of a gift?*

It is essential to the validity of a gift that it be accompanied by an actual or symbolical delivery of the thing given if the subject-matter of the gift is capable of delivery. 1 Wait's Law & Pr. 109 ; 1 Pars. on Cont. 234.

30. *At the close of his apprenticeship, A receives as a gift from B, his former master, a promissory note, in which, for value received, B promises to pay to A a certain sum at a specified time. Can A compel the payment of the note at maturity?*

He cannot, as the note is a mere promise made without consideration and cannot be made the foundation of a legal obligation to pay money.. By the delivery of the note, A acquires an absolute property in the note itself, but not in the sum of money which it represents. See 1 Wait's Law & Pr. 110 ; 1 Pars. on Cont. 236 ; Edwards on Bills & Prom. Notes, 324 (307).

31. *A indorses the note of B, and transfers it as a gift to C. The note had been previously indorsed by D, E and G. What is the legal effect of the gift?*

The gift is valid as an executed contract, and vests C with the same property in the note that formerly was vested in A. At the maturity of the note C may recover as against all parties thereto except A. Edwards on Bills & Prom. Notes, 325 (307) ; 1 Wait's Law & Pr. 110.

32. *Is there any, and if so what, distinction between the rights of parties to gifts inter vivos, and the rights of parties to gifts causa mortis?*

There is a broad distinction. A gift *inter vivos*, made perfect by delivery and acceptance, cannot be revoked by the donor; while a gift *causa mortis*, even if it be completed by delivery and acceptance, may be revoked by the donor at any time during his life. 1 Pars. on Cont. 235, 237; 1 Wait's Law & Pr. 110, 111.

33. *Is it essential to the validity of a contract that the assent of the parties thereto should be given at the same time?*

It is not. It is sufficient if the assent of one party to a proposed contract is given within a reasonable time and before the previous assent of the other party is withdrawn. 1 Wait's Law & Pr. 111; 1 Pars. on Cont. 482.

34. *A, in New York, on the first day of May, writes to B in San Francisco, making an offer, and this letter reaches B on the eighth⁸ day of May. Forthwith, upon its receipt, B writes to A, accepting the offer, mailing the answer the same day. Upon the second⁹ of May, A writes and mails a second letter to B, withdrawing the offer, which letter reaches B upon the ninth of the same month. Is there a contract made between the parties?*

There is. The contract was complete upon the deposit in the post-office of B's letter of acceptance.[✓] 1 Pars. on Cont. 484; 1 Wait's Law & Pr. 112. Properly addressed with *postage prepaid*

35. *What distinction is there between contracts made by mail and contracts made by telegraph, as to the time when the contract becomes complete?*

A contract made by mail is complete on the deposit in the post-office of an unconditional acceptance of a previous offer; while a contract made by telegraph becomes complete only upon the delivery of the message containing the acceptance of the previous order to the party for whom it is designed. 2 Wait's Law & Pr. 1015, note 18.

36. What are covenants?

Covenants are the stipulations or promises contained in a sealed instrument. 1 Wait's Law & Pr. 113.

37. What is a condition precedent?

A condition precedent is the performance of an act, which, by the terms of a contract, is made the condition upon which the obligation of the other party to do or not to do a certain act or acts depends. 1 Wait's Law & Pr. 113.

38. What is the rule of law governing the construction of contracts?

It is a rule of law to give that construction to a contract, which will bring it as near to the actual meaning of the parties, as the words employed, when properly construed, and the rules of law will permit. 2 Pars. on Cont. 494; 1 Wait's Law & Pr. 724.

39. When is the construction of a contract a matter of fact, and when is it a matter of law?

When technical terms, or words used in some peculiar sense, are employed in making a contract, the determination of their actual meaning is a question of fact. But when the meaning of the terms used is conceded or established, the construction of the entire contract becomes a matter of law. 1 Wait's Law & Pr. 723.

40. A and B enter into a contract which, through mistake or inadvertence, fails to express their meaning. Can the court, on an action being brought by A for a breach of the contract, give to it such a construction as will express the intent of the parties, and thereby render B liable for a breach of the intended contract?

It cannot. The office of construction is to interpret, and not to make, contracts. 2 Pars. on Cont. 497; 1 Wait's Law & Pr. 724.

41. *A agrees, for a sufficient consideration, to pay to B, at specified times, certain sums of money, "with interest." What construction should be given to the words quoted, if it should appear, from the entire contract or extrinsic proof, that the parties intended "compound interest?" Give the reasons for your answer.*

The contract should be construed as requiring the payment of simple interest only, as a contract for the payment of compound interest would be illegal; and it is a rule of law to give to a contract such a construction as will make it legal, rather than one which will render it illegal. 1 Wait's Law & Pr. 724; 2 Pars. on Cont. 497, 500.

42. *What is the general rule of construction, where the words used in a contract are susceptible of a double meaning, and it is uncertain what was the real intent of the parties?*

In such cases the presumption of law will be in favor of common and ordinary over the unusual meaning of words; the general over the particular; the comprehensive over the restricted; and, all other things being equal, if it is uncertain whether words are used in an enlarged or restricted sense, that construction will be given which is most beneficial to the promisee. 1 Wait's Law & Pr. 724, 725; 2 Wait's Law & Pr. 1116, note 373; 2 Pars. on Cont. 496, 506.

43. *When a contract is partly written and partly printed, and there is a discrepancy between the part which is written and the part which is printed, what will be the rule of construction?*

The written portions will be presumed to declare the actual intent of the parties, and will receive the preference in construction. 1 Wait's Law & Pr. 725; 2 Pars. on Cont. 516.

44. *When will several different instruments be taken together, in determining the construction of a contract?*

Where several instruments are made at the same time, between the same parties, and in relation to the same subject, or where they are not made at the same time, but may be connected together by reference from one to another, the several instruments will be held to constitute but one contract, and

will be read in such order of time and priority as will carry into effect the intention of the parties, as such intention may be gathered from all the instruments taken together. 1 Wait's Law & Pr. 725 ; 2 Pars. on Cont. 503.

45. Upon what theory are the personal representatives of the parties to a simple contract held bound by the contract?

Upon the presumption of law that the parties intended to bind, not only themselves, but their personal representatives. 2 Pars. on Cont. 530 ; 1 Wait's Law & Pr. 726.

46. Where a contract requires a certain thing to be done, but specifies no time in which it must be done, what is the presumption of law as to the time of the execution of the contract?

It is the presumption of law that the parties intended and agreed that the thing should be done in a reasonable time. What constitutes a reasonable time is a question of law for the court, and is to be determined on a consideration of all the facts and circumstances of the case. 2 Pars. on Cont. 535.

47. What is the general rule as to the admissibility of parol evidence in aid of the construction of a contract?

Parol evidence is admissible to explain a valid written contract, but inadmissible to contradict or vary its terms. 2 Wait's Law & Pr. 452 ; 2 Pars. on Cont. 548.

48. How would you establish the fact that certain words in a contract were used in a technical, and not in their ordinary, sense?

By parol evidence, tending to show that the words in question, when used concerning the subject-matter of the contract, have always been employed to convey a meaning other than that conveyed when ordinarily used, and that this fact was known to both parties to the contract. 2 Wait's Law & Pr. 458, 462 ; 2 Pars. on Cont. 542.

49. What is the rule of law as to the validity of a contract considered in relation to the place where it is made?

It is a general rule that a contract which is valid where it

is made, is valid everywhere ; and if void or illegal by the law of the place where it is made, it is void everywhere. 2 Pars. on Cont. 570.

50. *A note bearing interest is made in Boston, but by its terms is payable in New York. In the absence of any express provisions in the contract as to the rate of interest, what interest is recoverable; and why?*

66

Interest is recoverable at the rate of seven per cent. Where a contract for the payment of money is made at one place and payment is to be made at another, and no interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable. 1 Wait's Law & Pr. 549, 577; Edwards on Bills & Prom. Notes, 714 (673); 2 Pars. on Cont. 586.

51. *A promissory note bearing interest at ten per cent is made in Louisiana, but is payable in New York. Is the note usurious?*

It is not. The parties to a note have a right to stipulate for the payment of interest according to the law of the place of contract, or according to the law of the place of performance at their election. See Edwards on Bills & Prom. Notes, 717 (677); 2 Wait's Law & Pr. 1091, note 277; 2 Pars. on Cont. 584.

52. *Marriage is said to be only a civil contract. Can we apply to this contract the general rule that a contract which is valid where it is made is valid everywhere, and if void by the law of the place where it is made is void everywhere?*

The rule is generally, although not universally, applicable. A man who might be the lawful husband of two wives in the Territory of Utah would not be so held in New York; while a marriage of Americans according to American forms might be absolutely void in China, but would be certainly valid here. 2. Pars. on Cont. 592.

53. What is a sale?

A sale is an agreement by which the title to property is

transferred from one person to another for a legal consideration. 1 Wait's Law & Pr. 464.

54. *What questions of intent are essential in determining whether a given contract is in effect a sale?*

In order to determine whether a given contract amounts to a sale, it is necessary to determine whether it shows an intent that the title to the property or subject-matter of the contract shall pass from one of the parties to the other, coupled with an intent that the price shall be payable absolutely. If such intent is shown the contract is a sale. 1 Wait's Law & Pr. 464; 1 Pars. on Cont. 519.

55. *A leases his dairy farm to B for a term of five years at a certain annual rent. The lease provides that at the expiration of the term, B shall return to A cows of an age and quality equal to those received by B under the contract. Was the contract a sale or a bailment, and could the cattle be levied on under an execution against the property of B?*

The contract was a sale under which the title to the cattle passed from A to B, and consequently became liable for the debts of the latter. 1 Wait's Law & Pr. 465.

56. *A, for a valuable consideration, agrees to sell and deliver certain personal property to B on a day specified. Does this agreement effect a sale of the property in question and vest B with the title to the property?*

It does not. The agreement is not a sale, but a contract of sale, and the title to the property does not vest in B before delivery. 1 Wait's Law & Pr. 470.

57. *A buys and pays for a parcel of cotton consisting of one hundred bales, and another one hundred bales unselected out of one thousand bales, all of which are consumed by fire before delivery. On whom does the loss fall, and why?*

The loss of the first lot of one hundred bales falls on the buyer, for as the parcel was ascertained and distinguished at the time of the contract the property in the cotton passed to the buyer. The loss of the second lot of one hundred bales,

unselected and unascertained, falls on the vendor, for no property therein passed to the buyer by the contract. 1 Wait's Law & Pr. 490.

58. *A sells a horse to B for a certain sum, taking B's note for a part of the purchase-money. It is afterward discovered by the parties that the horse was dead at the time of the sale. Can A recover upon the note?*

He cannot. A sale of property which both parties suppose to be in existence, but which in point of fact has ceased to exist, is void and cannot be enforced. 1 Wait's Law & Pr. 469 ; 1 Pars. on Cont. 522.

59. *Does the title to the goods specified in a contract of sale pass in all cases upon delivery?*

It does not. The parties may so limit the effect of the delivery by express agreement, that the title of the goods delivered shall remain in the vendor until the performance of certain conditions or the happening of a certain event, as until the sale of the goods, or the payment of the full purchase price. 1 Wait's Law & Pr. 480 ; 1 Pars. on Cont. 537.

60. *A purchases liquors of B to stock an unlicensed grocery store, and gives B a receipt specifying that the goods were to remain the property of B until paid for, the goods to be paid for when sold, or returned when called for. Upon what principle can the sale be held as absolute and unconditional and the goods liable for the debts of A?*

Upon the principle that when the purposes for which the possession of the property is delivered to a buyer are inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent, as against purchasers and creditors. 1 Wait's Law & Pr. 484 ; 1 Pars. on Cont. 538.

61. *A, knowing himself insolvent, purchases goods of B, with the design not to pay for them, and forthwith makes a general assignment to C for the benefit of his creditors. Does C obtain such a title to the goods as will defeat an action brought by B for the recovery of their possession?*

He does not. The sale being fraudulent as between the

original parties, no title passes to A, and C, not being a *bona fide* holder for value, can take by the assignment no greater title than was possessed by his assignor. 1 Wait's Pr. 719, 721; 1 Wait's Law & Pr. 504, 505.

62. Into how many classes may contracts of warranty be divided?

Into four classes, viz.: two in respect to form, and two in respect to subject-matter. In respect to form, contracts of warranty are express or implied; in respect to subject-matter, there may be a warranty of title or a warranty of quality. Pars. on Cont. 573; 1 Wait's Law & Pr. 517.

63. A sells a horse to B, giving a written contract of warranty that the horse is sound. Can B recover for a breach of the contract of warranty on proof that the horse was unsound at the time of sale, if it also appears that the unsoundness was unknown to A, and the warranty given in good faith?

He can. An express warranty extends to all the defects or faults which it covers, whether they are known or unknown to the vendor. 1 Wait's Law & Pr. 517.

64. Is a contract of warranty made after the time of sale binding upon the vendor?

It is not. It is void for want of consideration. 1 Wait's Law & Pr. 521.

65. What is the meaning of the maxim *caveat emptor*?

By this maxim is meant, that in all executed sales, or sales of property which the vendor has on hand at the time of making a contract of sale, the purchaser must take the property at his own risk as to quality, if there is neither an express warranty nor fraud on the part of the vendor. 1 Wait's Law & Pr. 525.

66. What is the general rule respecting implied contracts of warranty of quality?

It is a general rule that where there is no express warranty of quality, the law implies none. 1 Pars. on Cont. 577.

67. Give some exceptions to the general application of the maxim caveat emptor?

The sale of goods by sample carries with it an implied warranty that the goods correspond with the sample. So the sale of goods, to be procured or manufactured at a future day, carries with it an implied warranty that the goods shall be merchantable, or of a medium quality. 1 Wait's Law & Pr. 528 ; 1 Pars. on Cont. 585, 586.

68. When will, and when will not, the law imply a warranty of title to the thing sold?

When the thing sold is in the possession of the vendor at the time of sale, the law will imply a warranty of title. But where a chattel is sold while in the possession of a third person, no warranty of title will be implied. 1 Wait's Law & Pr. 530 ; 1 Pars. on Cont. 574.

69. A, by a written contract of sale, which contains no clause of warranty, conveys a certain chattel to B. Prior to, and at the time of executing the contract, A makes representations and assertions amounting to an express warranty. Can B recover in an action against A upon a breach of this parol contract of warranty?

He cannot. Evidence of a warranty not contained in the contract of sale would be inadmissible, and the action would fail for want of proof. 1 Wait's Law & Pr. 533 ; 1 Pars. on Cont. 589.

70. What is the right of stoppage in transitu?

It is that right which the law gives to a vendor to stop and resume possession of goods on their way to a vendee who has purchased such goods on credit, and has subsequently been discovered to be insolvent. 1 Wait's Law & Pr. 534 ; 1 Pars. on Cont. 595.

71. When does the right of stoppage in transitu cease?

When the goods have come into the actual or constructive possession of the vendee, the vendor's right to reclaim the goods ceases. 1 Wait's Law & Pr. 534 ; 1 Pars. on Cont. 601.

72. A sells goods to B on credit, C becoming surety for the price. After the sale of the goods to B, but before they come into his possession, C discovers that B is insolvent. Can C exercise the right of stoppage in transitu?

He cannot. The right of stoppage *in transitu* exists only between vendor and vendee, or between persons standing substantially in that relation. 1 Pars. on Cont. 600; 1 Wait's Law & Pr. 534.

73. What will be the effect of an indorsement and delivery of a bill of lading by the vendee of goods to a second vendee?

The indorsement and delivery of a bill of lading of goods is a constructive delivery of the goods; and, if made in good faith and for a valuable consideration, passes the property to the second vendee, and terminates the right of the original vendor to stop the goods *in transitu*. 1 Pars. on Cont. 606.

74. When will a contract for the sale of any goods be void under the statute of frauds?

Every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, will be void, unless, (1) A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or, (2) Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, (3) Unless the buyer shall at the time pay some part of the purchase-money. 1 Wait's Law & Pr. 536.

75. An oral contract is entered into, between a debtor and creditor, to the effect that the former shall deliver, and the latter receive, chattels of more than \$50 value, in payment of an existing debt. No memorandum of the agreement was made or signed by the parties, and no part of the chattels delivered. Will the act of crediting the debtor with the value of the chattels, on the books of the creditor, act as a payment, so as to make the contract valid under the statute?

It will not. The contract will be void under the statute. 2 Wait's Law & Pr. 1087, note 262.

76. A wagon maker agrees to make a wagon, find the materials, and deliver it at a future day. The purchaser agrees to pay \$100 for the wagon on delivery. Is the contract void within the statute of frauds? Give the reason for your answer.

The contract is not void. It is not a contract for the sale of a chattel, but for work, labor and materials, and consequently is not within the statute. 1 Wait's Law & Pr. 542, 543.

77. In what cases will a plea of payment, by note, be a good defense in an action upon a book account?

1. When the note was given under an express agreement that it should be taken as payment of the account. 2. When the note is negotiable, and the plaintiff fails to produce or cancel it upon the trial, or to prove its loss; and 3. When the time of payment of the note has not arrived. Edwards on Bills & Notes, 192 (181); 1 Wait's Law & Pr. 408; 2 Pars. on Cont. 624.

78. In the absence of an express agreement, will payment by a non-negotiable note extinguish the prior indebtedness for which it is given?

It will not. It merely operates to extend the time of payment of the original indebtedness until the maturity of the note, when, if the note is unpaid, the creditor may recover on the original indebtedness, on delivering up the note, to be canceled upon the trial. 1 Wait's Law & Pr. 408; Edwards on Bills & Notes, 197 (186).

79. A contract contains a promise, in the alternative, that A shall pay to B a specific sum, or deliver certain chattels at a particular time. To whom does the right of election belong, as to what shall be paid?

Before the day for performance, the right of election rests solely with the promisor; but after the day of performance has passed, without any election by the promisor, the right of election is gone, and the promisee has an absolute right to the money. 1 Wait's Law & Pr. 1053.

80. *What is the effect of a legal tender of a sum due upon contract, when made before action?*

The effect of a tender of a sum of money due upon contract, before a suit brought for its recovery, is to stop the running of interest thereon and to protect the debtor from subsequent costs. The tender will not, however, extinguish the debt. 1 Wait's Law & Pr. 1054; 2 Pars. on Cont. 638.

81. *What are the essentials of a valid tender of money?*

1. The money must be actually produced and proffered, unless the creditor expressly or impliedly waives its production; 2. The tender must be unconditional; and 3. The tender must be in lawful money. 2 Pars. on Cont. 642; 1 Wait's Law & Pr. 1046; Wait's Code, 258.

82. *A, being indebted to B in the sum of \$100, offers to pay to B that amount if he will give him a receipt in full of all demands; is the tender valid?*

It is not; from the fact that it is made on condition. 1 Wait's Law & Pr. 1047; 2 Pars. on Cont. 644.

83. *An indorser of a negotiable promissory note offers to pay the note on condition that it be surrendered to him; will the fact that the tender is conditional defeat the object of the tender?*

It will not. 1 Wait's Law & Pr. 1048.

84. *In what actions may tender be made, after suit brought?*

1. In all actions at law for the recovery of a sum certain, or which may be reduced to certainty by calculation; and 2. In all actions for a casual or involuntary trespass or injury. 3 R. S. (5th ed.) 868, § 22; 1 Wait's Law & Pr. 1057.

85. *Where a contract provides for the payment of a debt in specific articles, what will be the legal effect of a valid tender of those articles?*

A valid tender of the articles will transfer the title of the articles tendered to the creditor, and discharge the debt, whether the creditor accepts the property or not. 1 Wait's Law & Pr. 1054; 2 Pars. on Cont. 653.

86. *What disposition must be made of the property tendered, if the tender is not accepted by the creditor?*

It must be held by the party making the tender as a bailee, at the risk and at the expense of the creditor. 1 Wait's Law & Pr. 1054.

87. *What is meant by accord and satisfaction?*

It is a new agreement between parties in satisfaction of a former one, and also the execution of the new agreement. 2 Pars. on Cont. 681 ; 1 Wait's Law & Pr. 1036.

88. *A father entered into a composition agreement with the creditors of his insolvent son, by which he agreed to pay forty cents on a dollar of his son's debts, the creditors respectively agreeing to accept that amount in satisfaction of their debts. After payment of the stipulated sum by the father, and acceptance of the same by the creditors, can the creditors recover any further sum in an action against the son upon the original indebtedness?*

They cannot. The son may plead the payment made by his father as an accord and satisfaction, and this, when proved, will be a perfect defense to the action. 2 Wait's Law & Pr. 1158; note 526.

89. *A creditor in consideration of part payment of a sum then due, gives his receipt in full satisfaction of the entire demand; will this receipt be a good defense by way of accord and satisfaction, in an action for the remainder?*

It will not. 1 Wait's Law & Pr. 1041 ; 2 Pars. on Cont. 686.

90. *Upon what principle is the part payment invalid as defense in the case last given, but valid in the one immediately preceding it?*

Upon the principle that it is essential to an accord and satisfaction that the creditor shall receive from it a distinct benefit which otherwise he would not have had. In the first case, the payment by the father is such a benefit; in the last case, nothing was received by the creditor beyond what the law had already given him. See 2 Pars. on Cont. 686 ; 1 Wait's Law & Pr. 1038.

91. *What is the effect of the proper submission of a controversy to an arbitrator, and the rendering of a valid award by him thereon?*

The award is a bar to any action upon the matter so submitted, even though the award has not been performed. 1 Wait's Law & Pr. 1033.

92. *What are the requisites of a valid award?*

1. That it conforms to the terms of the submission ;
2. That it is certain, in the sense of clearly showing the meaning of the arbitrators, the effect of the award, or the rights and duties of the parties under it ; 3. That it be possible ; 4. That it is reasonable ; and, 5. That it is final and conclusive. 2 Pars. on Cont. 688 ; 1 Wait's Law & Pr. 1022.

93. *Will a release of one of several joint debtors operate in all cases as a release of all of them?*

It will not. At common law a release of one of several joint debtors will operate as a release of all ; but, under the act of 1838, a creditor may release a partner or joint debtor without impairing his remedy against the others. Laws of 1838, ch. 257 ; 1 Wait's Law & Pr. 1009.

94. *A creditor, by a written instrument under seal, expressing only a nominal consideration, releases a debtor from a certain liability. Can the creditor afterward, in an action to enforce such liability, show by parol evidence that the release was, in fact, founded upon a consideration other than that expressed in the instrument, and that such consideration has wholly failed?*

He cannot. The rule of the common law that a release under seal, although reciting only a nominal consideration, extinguishes the debts to which it relates, has not been altered by the statute permitting an inquiry into the consideration of sealed instruments. 1 Wait's Law & Pr. 1010.

95. *Explain the distinction made by law between the conclusiveness of a release and the conclusiveness of a receipt?*

A release, by its own operation, extinguishes a pre-existing right, and, therefore, cannot be contradicted or explained

by parol evidence. A receipt never has the effect of destroying a subsisting right, but is mere evidence of the fact of payment, and like other facts given in evidence may be refuted or explained. It is the payment of money which extinguishes a debt, and not the receipt which is only evidence of the payment, while a written release is not only evidence of the extinguishment, but is the extinguisher itself. 1 Wait's Law & Pr. 1010.

96. *A tenant went into possession of certain premises under a lease under seal, which provided that, at the expiration of the term, he should yield up all erections and improvements made during the term. The tenant and landlord subsequently entered into an agreement by letter that if certain buildings were erected by the tenant, they might be removed by him at the expiration of his term. The buildings were erected under this agreement. At the expiration of the term, and after the death of the landlord, the tenant removed the buildings so erected. Could he be held liable, in an action brought by the executor of the landlord, for a breach of the covenant to yield up the improvements made during his tenancy?*

He could, under the rule of law which declares that a contract under seal cannot be discharged except by an instrument of equal force and validity, or an instrument also under seal. Hence, a parol license could not operate as a discharge of the covenant, and the tenant would be liable for the breach. 1 Wait's Law & Pr. 1061 ; id. 901.

97. *When is the alteration of a written contract by interlineation, addition, erasure, etc., a valid defense in an action on the contract?*

When the alteration was made after the contract was signed, and in a material part, without the consent of the party against whom the contract is sought to be enforced. 1 Wait's Law & Pr. 904.

98. *What will be the effect of altering the time of payment of a promissory note without the consent of the maker?*

An alteration which changes in any manner the time of

payment of a note destroys its identity, and discharges the maker from all obligations thereon. 1 Wait's Law & Pr. 908.

99. *What will be the effect of adding the words "or order" to a promissory note, without the consent of the maker?*

By the addition of the words "or order" a non negotiable note is changed to one which is negotiable, and the instrument thereby becomes void even in the hands of an innocent holder. 1 Wait's Law & Pr. 909.

100. *What is the general rule as to the amount of damages recoverable in an action on a breach of an ordinary contract?*

As a general rule, the amount of damages recoverable in an action on a breach of contract is measured by the actual pecuniary loss of the plaintiff arising directly out of the breach, without taking into account the loss arising incidentally from the breach, or the motives which led to the non-fulfillment of the contract. 2 Wait's Law & Pr. 649.

101. *What do you understand by the terms "remote" or "consequential damages?"*

The terms "remote" and "consequential" are applied to such damages as result indirectly from a specified act, to distinguish them from such as result directly from that act. Thus, the direct damages arising from the non-payment of a note are limited to the amount of the note and the costs incident to a recovery, while the consequential damages arising therefrom may extend to temporary derangement of business, loss of credit, and even the insolvency of the creditor. 2 Wait's Law & Pr. 649, 651.

102. *In what cases may prospective profits be recovered in an action on a breach of contract?*

A party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. But uncertain and contingent profits, such as are not capable of being definitely ascertained by reference to established market rates, are not recoverable. 2 Wait's Law & Pr. 651.

103. *By what term are those damages known which the parties have agreed, by express stipulation, shall be paid on the breach of a contract?*

Where the parties have agreed upon a fixed sum to be paid in case of a breach of a contract, the damages so agreed upon are termed liquidated damages. 2 Wait's Law & Pr. 670.

104. *Give the general principles governing the courts in relation to the enforcement of agreements to pay a fixed sum as liquidated damages?*

Where the intention of the parties to fix a sum mentioned as liquidated damages in case of default in the performance of some act agreed to be done is clear, the court will enforce the contract ; (2) If the damages would be otherwise uncertain and conjectural, an agreement to pay a sum denominated liquidated damages will be enforced ; and (3) if the agreement is in the alternative to do a certain act or to pay a certain sum, the court hold the party failing to have had his election and compel him to pay the money. 2 Wait's Law & Pr. 670.

105. *Is the use of the term "liquidated damages" in a contract conclusive evidence of the intent of the parties to fix upon a sum to be paid absolutely upon a breach of the contract?*

It is not. The court will seek to discover and give effect to the intent of the parties irrespective of the language used in some portions of the contract. 2 Wait's Law & Pr. 670.

106. *Give the general principles governing the construction of agreements to pay a fixed sum as damages on default in the performance of a contract?*

(1) The intent of the parties must be sought from the whole instrument ; (2) If the word "penalty" is used it will generally be held conclusive as against the other language employed in the instrument ; (3) If the sum stipulated is to be paid on the non-payment of a less sum which is certain in amount, and made payable by the same instrument, it will be treated as a penalty ; and (4) If it is clear that the sum was

fixed to evade the usury laws, or any other statutory enactment the court will treat the sum to be paid as a penalty. 2 Wait's Law & Pr. 670.

107. *What is the measure of damages in an action for a breach of warranty of soundness in the sale of a horse?*

The measure of damages is the difference between his value at the time of sale, considering him as sound, and his value with the defects alleged and proved. 2 Wait's Law & Pr. 663.

108. *What is the measure of damages in an action for a breach of an implied warranty of title in the sale of a horse?*

(1) The price paid and the interest thereon ; and (2) If the true owner has recovered the horse in an action of which the vendor had notice, then the costs recovered in such suit against the purchaser or his vendee. 2 Wait's Law & Pr. 665.

109. *In an action brought upon a chattel note which provides for the payment of \$1,000 in wheat at \$1.00 per bushel, at a specified time and place, what is the measure of damages for non-performance, it being conceded that wheat was worth \$1.50 per bushel at the time and place specified?*

The measure of damages is the sum specified in the note, viz., \$1,000, and not the value of the wheat at the time and place fixed for payment. 2 Wait's Law & Pr. 658.

110. *In an action brought upon an express agreement to deliver goods on a specified day, what is the measure of damages for the non-delivery at the specified time?*

The measure of damages is the difference between the contract price of the goods and the price for which they were actually sold in market at the time of their arrival. 2 Wait's Law & Pr. 669.

CHAPTER VIII.

AGENCY, OR PRINCIPAL AND AGENT.

1. *Where one person employs another to transact his business and manage his affairs for him, what is the relation thus created called?*

Such a relation is in law an agency ; the person employed being called an agent, and the person employing an agent being called the principal. 1 Pars. on Cont. 39.

2. *Upon what is such a relation founded?*

An agency is founded upon either an express or an implied contract, in which one of the parties, the principal, confides to the other, the agent, the management of some business to be transacted in the name of the former, or on his account, and in which the latter assumes to transact the business and give an account of it. 1 Wait's Law & Pr. 215 ; 2 Kent's Com. 612.

3. *In accordance with what general rule is the creation of an agency authorized?*

It is a general rule in law, that whatever one has power to do lawfully in his own right, he may do by another appointed as his agent, such as selling lands or goods, making contracts and the like. It follows, as an inference from this rule, that the principal cannot do through an agent what he cannot do in person. 1 Wait's Law & Pr. 215.

4. *How may the authority of an agent be created?*

By a written sealed instrument, an unsealed written instrument, or verbally, without writing ; and, for the ordinary purposes of business and commerce, the latter mode is sufficient. The agency may also be inferred from the relation of the parties, and the nature of the business in which the agent is employed, without proof of any express authority having been conferred by the principal. 1 Wait's Law & Pr. 217 ; 2 Kent's Com. 614.

5. What is the extent of the authority of an agent appointed by parol?

Generally, an agent appointed by parol is authorized to do any act, or make any contract not required to be executed under seal. But an authority to execute a deed or instrument under seal must be given in writing, under seal of equal dignity and solemnity with the deed itself. 1 Wait's Law & Pr. 217; 1 Pars. on Cont. 47.

6. Is there any exception to the rule, that the authority to execute a deed must be by deed?

There is one, namely, where the agent or attorney affixes the seal of the principal in his presence and by his direction. 9 Wend. 56.

7. Give the distinction between a general agent and a special agent?

A general agent is one having authority to transact all of his principal's business, or all of his business of a particular kind, or at some particular place; while a special agent is one authorized to do only one or more special acts in pursuance of particular instructions. 1 Wait's Law & Pr. 215, 216.

8. To what extent are the acts of a general agent binding upon his principal?

The acts of a general agent will bind his principal so long as he acts within the usual and ordinary scope of the business he was authorized to transact; and this is the rule even though he act contrary to private instructions, provided the person dealing with the agent was ignorant of the fact that he had exceeded his authority. 1 Wait's Law & Pr. 215, 216; 2 Kent's Com. 620.

9. Is the principal bound by the acts of a special agent if he exceeds the bounds of his authority?

No. The authority of a special agent must be strictly pursued, and if a person deals with such agent without ascertaining the extent of his authority, he does so at his peril, and the principal will not be bound by any act which exceeds the

special authority given. 1 Wait's Law & Pr. 216; 2 Kent's Com. 621.

10. *May persons act as agents who have no legal capacity to make valid contracts upon their own account?*

They may ; and the acts of such agents will fully bind the principal. It is the duty of the principal to protect his own rights in selecting an agent to transact his business, and if he neglects to do so, he must suffer the loss which may result from his own indifference or negligence. Infants may act as agents, and so may married women act as agents for third persons, or for their husbands. 1 Wait's Law & Pr. 215, 663.

10. *Can a married woman legally appoint an agent?*

At common law the wife has no power to appoint an agent or attorney ; but under the law as it now stands in this State, she may appoint an agent and carry on business in her own name. 1 Wait's Law & Pr. 218.

12. *An agent is authorized by his principal to sign a note payable in six months, and the agent signs the note payable in sixty days; is the principal bound thereby?*

No ; for the authority of the agent was special, and the principal is not bound beyond the scope of such authority. Wait's Law & Pr. 216 ; 2 Kent's Com. 618.

13. *A is a horse dealer, and B, his servant, sells a horse for him, and warrants it sound contrary to the express instructions of A, is A bound by this contract?*

He is ; on the ground that the servant having a general authority to sell acted within the general scope of his authority, and the public cannot be supposed to be acquainted with the private conversations between the master and servant. 2 Kent's Com. 621 ; see, 1 Wait's Law & Pr. 216.

14. *State the proper mode of executing an authority by an agent?*

The proper mode is to do it in the name of the principal or person giving the authority, and not in the name of the agent. Thus, where A B is principal, and C D is agent,

the agent should execute the paper by signing it "A B, by C D," his agent. 1 Wait's Law & Pr. 223.

15. How must a sealed instrument be executed by an agent or attorney?

In order to bind the principal in cases in which the contract is required by law to be under seal, it is an inflexible rule, that the instrument must be executed in the name of the principal, and purport to be sealed with his seal. 1 Wait's Law & Pr. 223; 1 Pars. on Cont. 54.

16. Has an agent power to employ a sub-agent, without the knowledge or consent of his principal?

Ordinarily he has not. The agency is generally a personal trust which cannot be delegated to another; but this rule is not so inflexible as to prevent an agent from employing such assistance as may be necessary in executing the duties of his trust. 1 Wait's Law & Pr. 232; 2 Kent's Com. 633.

17. When does an agent become personally liable to third persons on his contract?

An agent may incur liability to third persons by exceeding the authority conferred upon him, or by entering into and undertaking in his own name; or, he may become liable where there is no responsible principal, or if he neglects or refuses to disclose the name of his principal. 1 Wait's Law & Pr. 254; 2 Kent's Com. 630.

18. Give the distinction between the respective liabilities of principal and agent upon contracts under seal, and upon those not under seal?

In order to make the covenants in a sealed instrument, executed by an agent, binding upon the principal, the agreement must be executed in his name, and his seal must be affixed to it, and it must purport to be his deed, and not the deed of the agent. On written contracts not under seal, less strictness is required, and if the name of the principal and a relation of agency be stated in the writing, and the agent is really authorized, the principal alone is bound, unless the

language expresses a clear intention to bind the agent personally. 1 Wait's Law & Pr. 256 ; 2 Kent's Com. 631.

19. *If an agent purchase goods, without disclosing the name of his principal, is he discharged from the personal liability thus incurred by the subsequent discovery of the name of his principal?*

No ; the only effect of the discovery is that principal and agent are both liable, and the seller may, at his election, proceed against either or both. 1 Wait's Law & Pr. 257 ; 2 Kent's Com. 631.

20. *What is the rule of law as to the liability of public agents on their contracts?*

When a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the government are public, and not personal, and he will not be held personally liable on them unless it appears that the credit was given to, or the labor performed for, the agent himself, and on his agreement and promise to pay ; or the fact of his being a public agent was unknown and not disclosed at the time of making the contract. 1 Wait's Law & Pr. 232 ; 2 Kent's Com. 647, note.

21. *How may the unauthorized acts of an agent be rendered valid, so as to be binding on the principal?*

Where a person assumes to act as the agent of another, but without naming his principal, the latter may adopt and ratify what has been done, and receive the benefit of the agreement, although such assumed agent had no previous authority. So, on the other hand, if the *alleged* principal ratifies the transaction, he will be bound by the contract, and estopped from denying its validity. A subsequent ratification is equivalent to a prior authority. 2 Kent's Com. 614 ; 1 Wait's Law & Pr. 221.

22. *What is essential to a full ratification?*

The ratification of an unauthorized act of an agent, in order to bind the principal, must be made with full knowledge of all the material facts, or, in other words, the ratification will

not bind where it appears that material facts were suppressed.
1 Wait's Law & Pr. 220.

23. When is the ratification complete?

The ratification is complete when the principal acknowledges what has been done in his name, consents to be bound by it, and manifests such intent to the other party in an unequivocal manner. It is not necessary that an act should be done which would create a technical estoppel upon the party ratifying. Story on Agency, §§ 252, 256.

24. Where a party, who undertakes to act as agent, affixes a seal to an instrument which does not need a seal, what effect will a parol ratification have upon the instrument?

It will have the effect to make the instrument obligatory upon the principal as a simple contract. 1 Pars. on Cont. 52; 1 Wait's Law & Pr. 223, 256.

25. To what extent does an agent, who exceeds his authority, render himself liable?

An agent, who exceeds his authority, renders himself liable to the whole extent of the contract, even though a part of it was within his authority. What he does within his authority, however, is valid, if that part be distinctly severable from the remainder. 1 Wait's Law & Pr. 256; 1 Pars. on Cont. 69.

26. What is the distinction between factors and brokers?

They are both and equally agents, but the former is distinguished from the latter by being intrusted with the possession and disposal of property, and with the apparent ownership of it, while the latter are merely employed to make a bargain in relation to it. The business of factors is usually done by a class of men called *commission merchants*. 1 Pars. on Cont. 91; 2 Kent's Com. 622; 1 Wait's Law & Pr. 233.

27. What is meant by the term *a del credere commission, in agency?*

The compensation to factors and brokers is usually a commission; and when the agent guarantees the payment of

the price for which he has sold the goods of his principal, then the commission is larger, as it includes a compensation for this risk. In such case he is said to act under a *de l'credere commission*. 1 Pars. on Cont. 91.

28. What degree of care are factors and brokers bound to exercise in the management of the business intrusted to them?

A factor or broker is bound to the exercise of ordinary care, and is liable for any negligence, error or default incompatible with the care and skill properly belonging to the business that he undertakes. 1 Pars. on Cont. 93.

29. To what compensation are agents entitled besides commissions?

They are further entitled to be re-imburshed for all advances they may make in the regular course of a legal employment; such as incidental charges for duties, warehouse room, and all payments for the necessary care and preservation of the property committed to their care. 1 Wait's Law & Pr. 244.

30. What is meant by the agent's right of lien, and how may it arise?

The lien of the agent is the right to retain possession of property belonging to another until some demand of the agent is satisfied, and it may arise in either of three ways: 1. By an express agreement; 2. By a general course of dealing in the trade in which the lien is set up; 3. From the particular circumstances of the dealing between the parties. 1 Wait's Law & Pr. 244; 2 Kent's Com. 634.

31. When is a factor or broker entitled to his commissions for his services?

As a general rule, neither has a right to his commissions until the whole service is performed for which these commissions are given as compensation. 1 Pars. on Cont. 99.

32. What is necessary to the validity of a factor's or broker's claim for his commissions?

Neither factor nor broker can have any valid claim for

his commissions or other compensation, unless he has discharged all the duties of the employment which he has undertaken with proper care and skill, and entire fidelity. And, for his injurious default, he not only loses his claim, but the principal has a claim for damages. 1 Wait's Law & Pr. 251; 1 Pars. on Cont. 99, 100.

33. State the general rule as to the liability of the principal for the acts of his agent?

As a general rule, the principal shall lose by the fraudulent, negligent or illegal act of his agent, rather than an innocent person. Thus, the appropriation by an agent to his own use of money borrowed by him for his principal does not exonerate such principal from liability to the lender if the agent had authority to borrow it. 1 Wait's Law & Pr. 246, 247; see Story on Agency, §§ 465-477.

34. Is the principal liable for willful trespass committed by his agent?

He is not; provided he neither authorizes nor ratifies such trespass on the part of his agent. 2 Kent's Com. 633, note.

35. What is the rule of liability of the agent to his principal?

The law requires that the agent shall possess competent skill and knowledge of such business as he undertakes to perform, that he act with diligence in matters requiring prompt action, and that he act in good faith toward his principal. For the want of such good faith, skill or diligence the agent will be liable to his principal for any damages which may result to him. 1 Wait's Law & Pr. 251; 1 Pars. on Cont. 85.

36. May the principal adopt in part the unauthorized act of his agent and reject the rest?

No. The adoption of the agency in part is an adoption of the whole, on the ground that a principal is not permitted to accept and confirm so much of a contract, made by one purporting to be his agent, as he shall think beneficial to himself, rejecting the remainder. 1 Pars. on Cont. 51.

37. *If the agent does a different business from that he was authorized to do, although more advantageous to the principal, is the latter bound thereby?*

He is not, because the agent deviated from the subject-matter of his instructions. 2 Kent's Com. 620.

38. *State the rule as to the extent of a factor's lien.*

A factor has not only a particular lien upon the goods of his principal in his possession, for the charges arising on account of them, but he has a general lien for the balance of his general account arising in the course of dealings between him and his principal ; and this lien extends to all the goods of the principal in his hands in the character of factor. It does not extend, however, to a collateral debt, not growing out of the relationship of principal and factor, such as a debt due for rent, etc. 1 Wait's Law & Pr. 244; 2 Kent's Com. 640.

39. *An agent, in selling goods for his principal, makes a material misrepresentation which he believes to be true, but which his principal knows to be false, is the sale a valid one?*

It is not ; for the misrepresentation of the agent is the falsehood of the principal, and this is sufficient to avoid the sale. 1 Pars. on Cont. 61.

40. *In what various ways may the authority of an agent be terminated?*

It may terminate with the death of the agent ; by the limitation of the power to a particular period of time ; by the execution of the business which the agent was constituted to perform ; by a change in the state or condition of the principal ; by his express revocation of the power, and by his death. An ordinary agency is terminated by the death of the principal, as to all persons who have notice of it. 1 Wait's Law & Pr. 258 ; 2 Kent's Com. 643.

41. *May the principal revoke the authority of an agent at any time?*

He may at any time prior to the completion of any contract or the performance of any particular acts by the agent,

unless the authority is coupled with an interest, or given for a valuable consideration. 1 Pars. on Cont. 69, 70; 1 Wait's Law & Pr. 258.

42. Is it necessary that the agent should be notified of the revocation of his authority?

Yes; for until such notice is given the acts of the agent will be binding upon the principal. 1 Wait's Law & Pr. 258.

43. Will the lunacy of a principal operate to revoke the authority of an agent?

It will; but the lunacy must be judicially established, by an inquisition or otherwise, before it can have any such effect. 1 Wait's Law & Pr. 259; 2 Kent's Com. 645.

44. Does the death of the principal operate, in every case, as a revocation of the agency?

No; for if the agency is coupled with an interest vested in the agent, it survives, and the agent may do all that is necessary to realize his interest and make it beneficial to himself. 1 Pars. on Cont. 72; 1 Wait's Law & Pr. 259.

45. What must be the nature of the interest which will authorize the execution of a power after the death of the principal?

It must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing. 1 Wait's Law & Pr. 258

CHAPTER IX.

PRINCIPAL AND SURETY.

1. What constitutes the relation of principal and surety?

This relation exists when one person undertakes to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person, who is himself primarily responsible for the payment of such

debt or the performance of the act or duty. 1 Wait's Law & Pr. 368; 3 Kent's Com. 121.

2. Is it essential, in such contract, that there should be a principal, or third party, primarily liable?

It is, for there can be no accessory without a principal. If, therefore, no contract has been entered into with the third party, on whose account the covenantor or promisor professes to act as surety, no liability attaches to the latter, as he cannot be made primarily liable upon a contract by which he has expressly imposed upon himself only a secondary liability as surety. 1 Wait's Law & Pr. 368.

3. Who are legally capable of becoming parties to contracts, as sureties?

Every person, who is legally capable of making valid contracts of any kind, may become liable as a surety. 1 Wait's Law & Pr. 368.

4. Is it necessary that a contract of suretyship should be founded upon a consideration?

It is, and, without a valid legal consideration, such contract cannot be enforced. And in all those States in which the statute of frauds is in force, the agreement must be in writing, subscribed by the surety, and the contract must express the consideration. In New York the consideration need not be expressed. 1 Wait's Law & Pr. 369; 3 Kent's Com. 121.

5. In what cases must there be a new and distinct consideration to sustain the guaranty?

If the original debt or obligation is already incurred or undertaken previous to the collateral undertaking, then there must be a new and distinct consideration to sustain the guaranty. But if the original debt or obligation be founded upon a good consideration, and at the time when it is incurred or undertaken, or before that time, the guaranty is given and received, and enters into the inducement for giving credit or supplying goods, then the consideration for which the original debt is incurred is regarded as a consideration also for the guaranty. 2 Pars. on Cont. 7; 3 Kent's Com. 122.

6. State some of the ways in which a surety may be discharged from his liability.

This result may be brought about from the terms of the contract itself, or from some act of the parties. Thus, if the contract in terms declares that the liability shall terminate at a particular time, or on the occurrence of some specified event, then the liability will cease at the expiration of the time of the happening of the event. So payment, or other discharge of the obligation by the principal, will discharge the surety; and a lawful tender by the principal, or his authorized agent, will have the same effect. 1 Wait's Law & Pr. 369.

7. What effect will fraud have upon a contract of this kind?

If any fraud exists in the consideration of the contract, or in the circumstances which induced it, the contract is wholly void, and the surety is thereby discharged from all liability. 2 Pars. on Cont. 7; 1 Wait's Law & Pr. 369.

8. Within what limits is the responsibility of a surety confined?

The responsibility of a surety is strictly confined within the clear and absolute terms and meaning of his undertaking, and presumptions and equities are never allowed to enlarge, or in any degree to change the legal obligations he has assumed. 1 Wait's Law & Pr. 370; 3 Kent's Com. 124.

9. Suppose a person proposes to a creditor to become surety for another, but makes it a condition that he is to be notified by the creditor if accepted, will the surety be bound notwithstanding no notice of acceptance has been given by the creditor?

He will not, because in this case there is no contract until the notice is given. 1 Wait's Law & Pr. 371.

10. If a person writes a letter to another, and promises to indemnify him if he will sell goods to a third person, is such a promise binding without any notice of acceptance?

It is, and if the goods are furnished the surety is liable. When the offer made is in the nature of a request to sell goods or of a promise to pay for them if sold by the creditor, then no notice is necessary. 1 Wait's Law & Pr. 371.

11. Suppose a creditor delays the prosecution of his demand against the principal debtor, will this delay have the effect to discharge the surety?

As a general rule, mere delay on the part of the creditor will not discharge the surety; but if a creditor delays, neglects or refuses to collect his demand of a solvent principal, after a request by the surety that it shall be done, and the principal subsequently becomes insolvent, this will discharge the surety.
2 Pars. on Cont. 23; 1 Wait's Law & Pr. 373.

12. Where a creditor makes a valid and binding agreement to extend the time of payment by the principal debtor, is the liability of the surety thereby affected?

By such extension of time by the creditor the surety is wholly released from all liability; and this is so, although the principal, at the time of such agreement, is actually insolvent.
1 Wait's Law & Pr. 374; 2 Pars. on Cont. 28.

13. Will a mere voluntary promise, or an agreement without any consideration to extend the time of payment, be sufficient to discharge the surety?

It will not, because such agreement is not binding, and does not prevent immediate proceedings upon the debt due from the principal. 1 Wait's Law & Pr. 374.

14. Suppose a creditor agrees with the principal debtor, without the consent of a surety, to extend the time of payment of the debt for a usurious consideration paid at the time, will this agreement discharge the surety?

It will, for the usurer is not allowed to show that an obligation which he has taken in satisfaction of a prior demand, is usurious and therefore void in order to avoid the effect of such obligation as a satisfaction of the prior demand. 1 Wait's Law & Pr. 375.

15. When may the surety recover of the principal?

A surety cannot recover of the principal until he has paid the demand, either in money, or until he has in some other manner satisfied the indebtedness. 1 Wait's Law & Pr. 376.

16. Suppose that several sureties sign a note of the principal at his request, at different times, without communication with each other, and the principal fails, in what manner are the sureties liable?

In such case they are bound to contribute equally to the payment of the note; and where the first of such sureties pays the whole note, he may recover from the last his proportion of the amount so paid. 1 Wait's Law & Pr. 377.

17. Are there any cases in which a surety cannot enforce contribution from his co-sureties?

There are; as, where one person verbally agrees to indemnify another from loss in consequence of his signing a written obligation, the party so verbally indemnifying cannot call on the co-surety for contribution. So when one surety is discharged, pursuant to a bankrupt law, from his obligation to answer for the demand against the principal, he is not liable to his co-surety for contribution. 1 Wait's Law & Pr. 377.

18. A party signs a note as the surety of another, and subsequently a third person affixes his name also as maker, adding to his signature the words "surety for the above parties." Can the first surety, in case he pays the note, compel contribution against the second surety?

He cannot, unless it is made satisfactorily to appear that the second surety intended to place himself in the relation of co-surety with the first surety. 1 Wait's Law & Pr. 377.

19. What is the general rule of law as to the construction of continuing guaranties?

It is a general rule that they are to be construed favorably to the sureties, but in no case can there be a departure from the law for the purpose of favoring them. The language, when explicit, will control the construction, but when ambiguous parol evidence may be given to show the intention. 1 Wait's Law & Pr. 378.

20. Will a mere surety for a debt be bound by a judgment rendered in a suit between his principal and the creditor?

He will not, even though the suit was conducted exclu-

sively by the surety as the agent of the principal. 1 Wait's Law & Pr. 379.

21. *Are there any exceptions to the general rule that, where the principal is not liable, neither is the surety liable?*

Yes, for a surety will be liable if he guarantees the performance of an agreement by a married woman, though she is not liable to an action for refusing to perform it. So a surety for an infant will be liable on his contract, although the infant has a legal right to avail himself of infancy as a defense. 1 Wait's Law & Pr. 380 ; 3 Kent's Com. 124, note e.

22. *What is the distinction to be made between an absolute guaranty and a conditional guaranty, for the payment of a debt?*

Whenever the guaranty is an absolute one, the surety is liable, without any resort to the principal debtor in the first instance ; but when the guaranty is conditional, it is necessary to resort to the principal debtor, and attempt to collect it of him, before an action will lie against the surety. 1 Wait's Law & Pr. 381 ; 3 Kent's Com. 124.

23. *What is the undertaking of the guarantor upon a guaranty in the following words : "All drafts drawn by A will be duly honored and paid by me, should he meet with any misfortune that will render him unable to pay them himself?"*

In this case the guarantor undertakes to pay the amount of the drafts, if A shall not be able to do it himself. It is not, therefore, necessary for the acceptors to prove that they have exhausted their remedy against A. It is sufficient to show that the drafts were not paid when they became due. 1 Wait's Law & Pr. 382.

24. *Suppose a guaranty is in these words : "I guaranty the collection of the within note." Is the surety liable before a demand has been made upon the principal debtor?*

He is not, for such a guaranty requires the plaintiff to show diligence in attempting to collect of the indorser and maker, or he cannot recover of the surety. 1 Wait's Law & Pr. 381 ; 2 Pars. on Cont. 29.

25. Is a promise of guaranty revocable?

A promise of guaranty may be revoked at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. 2 Pars. on Cont. 30.

CHAPTER X.**PARTNERSHIPS.****1. What is a partnership?**

It is the relation growing out of a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent's Com. 23; 1 Wait's Law & Pr. 277; Story on Part., § 2; Collyer on Part., § 3.

2. What are the general divisions of partnerships?

Partnerships are either general or limited. They may be general in the sense of extending to the entire business carried on by the partners, or they may be general in respect to the common or general liability of all the members thereof for the partnership debts. They may be limited in respect to the extent or number of transactions to which they extend, or they may be limited in respect to the liability of some one or more of the partners for the partnership debts. 1 Wait's Law & Pr. 290.

3. Who are "ostensible" partners?

Ostensible partners are those whose names appear to the world as those of partners. 1 Wait's Law & Pr. 277.

4. Who are nominal partners?

A nominal partner is an ostensible partner having no interest in the firm. 1 Wait's Law & Pr. 1, 277; 1 Pars. on Cont. 171.

5. Who are special partners?

A special partner is one whose liability for the partnership debts is measured by the amount of cash contributed by him to the common stock, and who, though known to the world as having a limited interest in the partnership, takes no part in the transaction of its business. Special partners are unknown to the common law and have no existence, as such, independent of some statute. 1 Wait's Law & Pr. 290.

6. Who are "dormant" or "secret" partners?

A dormant partner is one whose name and transactions as a partner are professedly concealed from the world ; and when actually *unknown*, is sometimes called a secret partner. 1 Wait's Law & Pr. 277 ; 1 Pars. on Cont. 167.

7. If A and B, by joint purchase, become joint owners of certain property, will such purchase and ownership create a partnership in respect to the property?

It will not. It may create a tenancy in common, but not a partnership. 1 Wait's Law & Pr. 278.

8. What would be necessary to create a partnership among such tenants in common?

It would be necessary for the parties to agree to join in making some disposition of the property which would be likely to result in loss or gain, and to further agree to share such profit or loss between themselves. A partnership would be created by and at the time of such agreement. 1 Wait's Law & Pr. 278.

9. If two railroad corporations, engaged in operating two distinct but continuous lines of road, enter into a contract in which it is agreed that each shall operate its own line at its own expense ; that each shall be entitled to receive money for the transportation of freight or passengers over the entire road, or any part of the same ; and that the money so received shall be divided between them at stated intervals in proportion to the distance which each has respectively transported freight or passengers, the party found to have received more than his share paying over the balance at each settlement, will such contract constitute a partnership between the two corporations?

It will not. To constitute parties partners, as between

themselves, there must be an interest in the profits *as profits*. Each party must, by the agreement, participate in some way in the losses as well as in the profits, and a mere agreement to divide the gross earnings, as in the case stated, will not constitute the parties to it partners. 1 Wait's Law & Pr. 280 ; 2 id. 1043, note 117.

10. *State the conditions of profit and loss necessary to constitute a partnership as between members of the firm, and to create liability as to third persons.*

As between the members of the firm, an agreement to share in the profits or losses, however unequal the shares may be, will constitute a partnership, unless it clearly appears that such agreement should not have such an effect, as where there is an express stipulation to the contrary. As regards third parties, a man will be liable as a partner if he allows his name to be used, although he does not participate in the profit and loss. So as to third parties, a participation in the profits will render a party, not ostensibly a partner, liable for the debts of the firm. 1 Wait's Law & Pr. 282.

11. *Will the fact that an agent, employed to sell goods for a mercantile house, receives as compensation for his services one-fourth of the profits arising out of the purchase and sale of such goods, render him liable to third parties as a partner in the business?*

It will not. 1 Wait's Law & Pr. 284 ; 3 Kent's Com. 33 ; 1 Pars. on Cont. 160.

12. *If the owner of a farm lets it "on shares" to A, and is to receive a given proportion of the crops raised as a compensation for the land, while A is to receive the balance for his labor, will the existence of this relation between the parties create a partnership?*

It will not. The relation of the parties is not that of partners, but of tenants in common. 1 Wait's Law & Pr. 284.

13. *In the absence of any agreement, what will be the presumption of law in respect to the apportionment of the profits and losses of the partnership business?*

In the absence of any agreement, the law will presume

that the profits are to be equally divided and the losses equally borne. 1 Wait's Law & Pr. 286 ; Collyer on Part., § 167, note.

14. Upon what principle are secret and dormant partners held responsible to the creditors of the firm?

Upon the theory that, having participated in the profits of the partnership, they had by so much diminished the assets of the firm and reduced the fund to which the creditors were entitled to look for the payment of their claims. 1 Wait's Law & Pr. 282.

15. If A, after having been for many years known as a member of the firm of A, B and C, retires from the firm without giving public notice of his retirement, can he be held liable for debts of the firm subsequently contracted?

He will be liable to persons knowing of his former connection with the firm and ignorant of his retirement. The fact that his name had never been used in the firm will not alter his liability ; but a retiring ^{dormant} partner will not be liable for such debts of the remaining partners as are contracted under a new firm name assumed subsequent to his retirement. 1 Wait's Law & Pr. 289 ; 1 Pars. on Cont. 170.

16. What is the nature and extent of the interest of each partner in the partnership property?

Partners are joint tenants in the partnership property ; but without the right of survivorship. Until a balance of accounts is struck no partner has an exclusive right to any part of the joint stock. His interest is limited to his share in the surplus, after the partnership accounts are settled and all just claims satisfied. 1 Wait's Law & Pr. 289.

17. Can a person become a special partner in the banking or insurance business, and limit his liability to the amount of cash capital paid in, by following strictly the requirements of the statutes creating limited partnerships?

He cannot. A banking or insurance business cannot be carried on by a limited partnership having special partners. 1 Wait's Law & Pr. 290.

18. What is the measure of the liability of the members of a joint-stock company for the debts of the concern?

They are liable for the entire debts of the concern in the same manner and to the same extent as in an ordinary partnership. 1 Wait's Law & Pr. 292.

19. State the general rule regulating the liability of partners for the acts of each other?

It is a general rule that the act or contract of one partner with reference to and in the ordinary course and management of the partnership business and affairs, is, in point of law, the act or contract of the whole firm and binding on them, even though it violate some private arrangement between the partners. 1 Wait's Law & Pr. 294; 3 Kent's Com. 40, 41 ; 1 Pars. on Cont. 174.

20. How far will a confession of judgment by one partner be binding on the members of the partnership?

It will not be binding on any partner except the partner making it. 1 Wait's Law & Pr. 298.

21. Can one partner make a valid sale and transfer of all the copartnership effects, in payment of a debt to the creditor of the firm, without the knowledge or consent of his copartner?

He can, if the sale and transfer be not tainted with fraud. 1 Wait's Law & Pr. 299 ; 3 Kent's Com. 46 ; 1 Pars. on Cont. 178.

22. What is the extent of the liability of the members of a partnership for the partnership debt?

If the debt is contracted or the liability incurred in the ordinary course of business all the members are equally liable for its discharge ; and each partner is liable for the whole debt in case of the inability of the others to pay their just proportion. 1 Wait's Law & Pr. 299.

23. Whom would you join as defendants in an action on a breach of a contract of warranty in the sale of partnership property where the warranty was given by one partner only?

The action might be maintained against all the partners

jointly, or it may be maintained against the partner alone who made the contract of warranty. 1 Wait's Law & Pr. 300.

24. How may a partnership be dissolved?

The manner of dissolution may depend on the terms of the contract which created the partnership. It may be dissolved, 1. By the expiration of the time fixed for the continuance of the partnership ; or 2. By the completion of the business for which the partnership was created ; or 3. By the death of one or more of the partners ; or 4. By the bankruptcy of one or all of them ; or 5. By the sale or assignment of all the interest of a partner in the partnership property ; or 6. Where there has been no time fixed for the dissolution of a general trading partnership, it may be dissolved at the option of any partner by due notice to the other partners. 1 Wait's Law & Pr. 301 ; Collyer on Part., §§ 109, 119 ; 1 Pars. on Cont. 194-199.

25. What is the effect of a dissolution of a partnership on the rights and liabilities of the partners?

Upon the dissolution of the partnership, all the partners become tenants in common in the partnership property and effects ; the power of any partner to bind the firm by acts or agreements ceases, and the use of the partnership property is limited to transactions necessary to the winding up of the affairs of the concern. 1 Wait's Law & Pr. 303 ; Collyer on Part., § 545 ; 1 Pars. on Cont. 194.

26. After the dissolution of a partnership one of the former members of the firm executed and delivered to a creditor of the firm a promissory note in the firm name, for the purpose of reviving a debt barred by the statute of limitations. Can the creditor recover as against the partnership in an action on the note or on the original obligation?

He cannot. No partner has the power, after the dissolution of the partnership, to revive a partnership debt barred by the statute of limitations, or to bind the other partners by a note even when given for the purpose of providing for a debt due from the former firm. 1 Wait's Law & Pr. 303, 304 ; 3 Kent's Com. 50

27. *A and B are partners in trade ; A improperly uses the partnership name by making a promissory note in the name of the firm, which note B is compelled to pay. Has B any, and what, remedy against A ?*

As a general rule partners cannot sue one another at law ; but the case given is an exception, and B may recover the money from A as money paid to his use. 1 Pars. on Cont. 164, *note*.

28. *Can an action at law be maintained by one firm against another firm having a partner common to both ?*

Formerly such an action could not be maintained, as a person was not allowed to sue himself, or to be both plaintiff and defendant in the same action. The action was, however, maintained in equity, and is now maintainable since the abolition of the distinction between legal and equitable actions by the Code. 1 Wait's Pr. 136 ; 1 Wait's Law & Pr. 306.

29. *A and B being partners, A agrees to pay to B a certain share out of his profits for extra services rendered for the firm. Can B maintain an action against A to recover the amount due him from A under this agreement ?*

As a general rule a partner is entitled to no compensation for his services beyond his proper share of the profits of the concern, although he may perform the greater part of the work of the firm. But an express promise by one partner to pay out of his profits a certain share for extra services rendered by another is sufficient to support an action to recover the amount so due. 1 Wait's Law & Pr. 293, 306.

30. *Who are necessary defendants in an action against a limited partnership ?*

The general partners only. 1 Wait's Pr. 136.

CHAPTER XI.

BAILMENT.

1. What is the meaning of the term bailment?

The acts of borrowing, lending, hiring and of keeping chattels, or carrying or working upon them for another, are included in the term ; and whatever is delivered by the owner to another person, in any of the ways or for any of the purposes mentioned above, is bailed to him, and the law which determines the rights and duties of the parties, in relation to the property and to each other, is the law of bailments. 1 Wait's Law & Pr. 307 ; 2 Pars. on Cont. 56.

2. Explain the terms, *bailor* and *bailee*.

A *bailor* is one who delivers chattels to another, for some purpose, and upon an express or implied contract. A *bailee* is a party to whom chattels are delivered, for some purpose, and also upon an express or implied contract. 1 Wait's Law & Pr. 307.

3. Give the different kinds or sorts of bailments, as classified by writers on the subject.

First. *Depositum*, which is a mere deposit or delivery, without compensation or reward. Second. *Mandatum*, or gratuitous commission, in which the mandatory, or bailee, agrees to do something with or about the thing bailed. Third. *Commodatum*, or loan, as where a chattel is lent to a bailee, for his use, without compensation, and is to be itself returned. Fourth. *Pignus*, or pledge, as where a thing is bailed to a creditor as a security for a debt. Fifth. *Locatio*, or hiring for a reward or compensation. 2 Pars. on Cont. 89 ; 2 Kent's Com. 558 ; 1 Wait's Law & Pr. 308.

4. What is the general rule of law as to the responsibility of a bailee for property delivered to him?

A bailee is, in all cases, responsible for the property delivered to him, but the degree and measure of this responsibility are to be determined by the nature of the contract and the

law applicable to the agreement made ; or, in the absence of an express agreement, then to such as is implied by law, from the circumstances of the case. 1 Wait's Law & Pr. 307.

5. Into how many and what classes are bailees distributed, as regards the degree of care which the law requires them to exercise ?

They are usually distributed into three general classes. The first is when the bailment is for the benefit of the bailor alone, and in this class but slight care is required of the bailee, and he is not responsible except for gross negligence. The second is where the bailment is for the benefit of the bailee alone, in which the greatest care is required of him, and he is held responsible for slight negligence. The third is where the bailment is for the benefit of both bailor and bailee, in which class ordinary care is required of the bailee, and he is responsible for ordinary negligence. 2 Pars. on Cont. 88 ; 1 Wait's Law & Pr. 307, 308.

6. May real property be made the subject of bailment ?

No. Personal chattels, or movable things, which are capable of being delivered, can only be the subject of deposit or bailment of any kind. 1 Wait's Law & Pr. 309.

7. What is the nature of a deposit, or simple bailment ?

A deposit, or simple bailment, is a mere delivery or bailment of goods or chattels in trust, to be kept for the bailor by the bailee, and re-delivered on demand ; and a distinguishing feature of the contract is that the keeping is gratuitous. 2 Kent's Com. 560 ; 1 Wait's Law & Pr. 308 ; 2 Pars. on Cont. 90.

8. Since the keeping in a simple bailment is gratuitous, how, then, can the law imply, or the parties make, a valid contract ?

When a person receives the property into his custody, and actually enters upon the trust, the confidence placed in him and his undertaking will raise a sufficient consideration, after which he is bound to perform his agreement and execute his trust. *Rutgers v. Luest*, 2 Johns. Cas. 92.

9. May one be made a depositary against his will?

No ; it must be with his knowledge and consent, for no one can have the possession of another man's property with its accompanying duties and responsibilities forced upon him against his will. Consent may, however, in some cases be implied or inferred. 1 Wait's Law & Pr. 309 ; 2 Pars. on Cont. 96.

10. Is the finder of lost chattels, money or other lost property, under a legal obligation to take them into his custody?

He is not ; but if he assumes the charge of them the law imposes upon him the duties of a depositary, and gives to him a special property in them, and a right of action against all persons who shall injure, take, or convert the same. 2 Pars. on Cont. 96, 97.

• 11. What degree of care does the law require to be exercised by a depositary?

In general he is bound to take the same care of things accepted by him to keep, as he ordinarily does of his own property. He will be liable to make compensation to the owner, if the goods are stolen, damaged or lost by reason of gross negligence in the keeping of them, but he is not responsible for common neglect or ordinary casualties. 1 Wait's Law & Pr. 309 ; 2 Kent's Com. 560.

12. If the depositary loses his own goods at the same time that he loses the deposit made with him, will he be relieved of his liability to the bailor?

The question of liability in such cases is not to be determined by what the depositary may have done in the particular instance, but by his general habits and character, his mode of life, and the degree of care he has ordinarily bestowed upon his own property. If he has been guilty of gross negligence he cannot excuse himself from liability by showing that he lost his own goods at the same time that he lost his neighbors
1 Wait's Law & Pr. 311.

13. Suppose one selects as depositary a person of weak intellect, or a child, or a minor, without experience, or a notoriously idle and careless or drunken fellow, can such bailor be charged with the loss of the deposit?

No; for the bailor having been guilty of gross negligence in the first instance, by intrusting property to a person of whom he knew nothing, and into whose previous habits and character he did not trouble himself to inquire, has no ground, either in conscience or in point of law, to charge the bailee with the loss. 2 Kent's Com. 562; 1 Wait's Law & Pr. 311.

14. Goods are bailed by A to B, to be kept by the latter, and B bails them to C who uses and wastes the goods; does C incur any liability, and to whom?

He becomes liable to A for the loss of the goods, and A may maintain an action against him for the recovery of compensation in damages. 1 Wait's Law & Pr. 311.

15. May the depositary make use of the deposit for his own benefit and advantage?

As a general rule he has no right to do so, and if he does and the thing is lost or injured, the depositary must make good the loss; but if the subject-matter of the bailment be a living animal, as for example, a horse, which requires air or exercise, the bailee has an implied authority from the owner to use it to a reasonable extent, and is under an implied engagement to give it proper air and exercise. 1 Wait's Law & Pr. 311.

16. Suppose a deposit has been made in the hands of a bailee by two persons jointly, may the thing deposited be demanded back by one of them alone?

No; where a deposit is made by several depositors neither of them can legally demand a return of the property without the authority of all. But if the goods be deposited by one of several joint owners, the bailee may redeliver them to the party making the deposit. 1 Wait's Law & Pr. 312.

17. In case the depositor turns out to be a thief and to have stolen the things deposited, to whom must the depositary make restoration?

In this case the depositary must restore the deposit to the

true owner, if he appears. And when the true owner of the property reclaims it, or if the property is taken by virtue of legal process issued against the depositor, this will excuse the depositary for his omission to return it. 1 Wait's Law & Pr. 313.

18. When goods are bailed, to be delivered by the bailee on demand, where are such goods deliverable?

A bailee bound to deliver goods on demand discharges his obligation by delivering or tendering them where they are, or at his own residence or place of business, but the demand may be made of him elsewhere. 2 Pars. on Cont. 94 ; 1 Wait's Law & Pr. 313.

19. In what condition is the depositary bound to deliver the thing deposited?

He is bound to deliver it as it was when received, and with it all its increase and profits. Thus, where he has taken charge of a flock of sheep, he must restore the wool shorn from their backs and the lambs they have produced, together with the sheep themselves. So, if the profits, produce and increase of the deposit are of a perishable nature, such as milk, eggs and butter, and have been necessarily sold, the produce of the sale must be paid to the depositor. 1 Wait's Law & Pr. 313 ; 2 Pars. on Cont. 94.

20. If, in addition to assuming the mere passive custody of the thing bailed, the bailee or depositary, expressly or impliedly, undertakes that something shall be done to it gratuitously for the benefit of the bailor, is the nature of the bailment thereby discharged?

It is. On such undertaking, a mere naked deposit or simple bailment advances to a mandate, and the bailee becomes clothed with the duties and the implied engagements of a mandatary, in addition to those of a mere depositary for taking care and custody. 2 Pars. on Cont. 98 ; 1 Wait's Law & Pr. 314 ; 2 Kent's Com. 568.

21. Where a man promises to perform work upon the chattel of another gratuitously, and the chattel is bailed to him for the purpose expressed, is he under a legal obligation to perform the service?

Yes ; for his acceptance of the possession of the chattel

in execution of his engagement is an entering on the work and employment, and if, after having accepted such possession, and having taken the chattel away with him, he neglects to do that which he promised to perform, this neglect is a misfeasance for which he will be held responsible. In such case the delivery and acceptance of the chattel constitute a sufficient consideration. 1 Wait's Law & Pr. 315 ; 2 Pars. on Cont. 99.

22. May not the mandatary revoke his promise and return the chattel, and thus relieve himself from liability?

He may, if he does so without delay, and before his acceptance of the trust and his failure to fulfill it have occasioned loss or damage to the mandator ; but if such revocation will place the latter in a worse position than he was at the time the mandate was accepted and the promise made, the mandatary cannot lawfully withdraw such promise and refuse to execute the trust. 1 Wait's Law & Pr. 315.

23. Suppose you undertake gratuitously to convey money or goods from one place to another, and you enter upon the trust, what degree of care and diligence are you bound to exercise in the execution of the task ?

I will be answerable for the same degree of care and diligence as a person of common sense and common prudence might be expected to exercise in the conveyance of his own property. If, through my negligence or mismanagement, the goods are lost or stolen, injured or spoiled, the owner can hold me responsible for the loss. But if the money be taken from me by forcible robbery, without any default on my part, I cannot be held responsible for its loss. 2 Kent's Com. 569 ; 1 Wait's Law & Pr. 315.

24. If a chattel be bailed to a workman in some particular craft or trade, to be repaired gratuitously for the benefit of the mandator, will the mandatary in such case incur any liability for injuries caused by unskillful workmanship ?

He will, because the situation and profession of the artizan in such a case naturally imply that he is possessed of competent skill, and he is responsible for injuries resulting from

his neglect to use it, whether he is or is not to be paid for his labor and pains. 1 Wait's Law & Pr. 316.

25. *Suppose a person, known to be unskilled in the particular work or employment he gratuitously undertakes, does the work, at the solicitation of a friend, with such ability as he possesses, will he be responsible if the work is unskillfully done?*

No. In such case he will stand excused, for it is the mandator's own folly to intrust the work with him, and the party engages for no more than a reasonable exertion of his capacity. 1 Wait's Law & Pr. 316.

26. *If a surgeon should undertake, gratuitously, to attend a wounded person, and should treat him improperly, would he become liable for the improper treatment?*

He would, because his profession implied skill in surgery. 2 Kent's Com. 572.

27. *In respect to the custody and safe keeping of the chattel, what are the liabilities of the mandatory?*

In this respect he is clothed with the ordinary liabilities and responsibilities of a depositary, namely, he is bound to take the same amount of care of things accepted by him that he has ordinarily taken of his own property. He will be liable to make compensation to the owner, if the goods are stolen, damaged or lost by reason of gross negligence in the keeping of them ; but he is not responsible for common neglect or ordinary casualties. 1 Wait's Law & Pr. 315 ; 2 Kent's Com. 572.

28. *What are the obligations of a mandatory, where the subject-matter of the bailment consists of living animals, such as horses, oxen, cattle or sheep?*

He is bound to furnish them with suitable food or nourishment, and to give them a proper and reasonable amount of exercise and fresh air ; and if a man takes charge of cattle or sheep, and afterward takes no heed of them, but lets them stray away and get drowned or lost, it is a breach of trust, and he is responsible for the loss. 1 Wait's Law & Pr. 317 ; 2 Kent's Com. 572.

29. Suppose a mandatary intrusts with a servant what he himself has expressly undertaken to perform, does he thereby assume the responsibility of his servant's negligence?

He does; for the negligence of the servant, in carrying into execution the orders of the master, is the negligence of the master, and the latter will be responsible accordingly; but, if the servant deals with the property of his own will, and without the warrant or authority of the master, the latter is not responsible, unless there be a default in him in knowingly employing a drunken, negligent or dishonest servant. 1 Pars. on Cont. 102.

30. Where the bailee is to have the use and enjoyment of the subject-matter of the bailment for his own benefit and advantage, without payment of hire or reward to the bailor, what then is the nature of the bailment?

In this case the bailment becomes a gratuitous loan, and the bailee is clothed with the duties, responsibilities and implied engagements of a borrower for use, in addition to those of a mere depositary and mandatary. 1 Wait's Law & Pr. 316, 319; 2 Kent's Com. 574.

31. Give the distinction between a loan for use and a loan for consumption.

This is a distinction made by the Roman, or civil law, the former being called a *commodatum*, which is a loan of a specific chattel which is to be used by the bailee, and the identical article is then to be returned. The latter is called a *mutuum*, the thing being bailed to be consumed, and an equivalent in kind subsequently returned. 1 Wait's Law & Pr. 319; 2 Kent's Com. 573.

32. In a bailment by way of *mutuum*, or for consumption, how does the bailee become discharged from his liability to his bailor?

In a bailment of this kind, the chattel bailed becomes the absolute property of the bailee, to do what he pleases with it and use it in any way he thinks fit; and he fully discharges his engagement by substituting the same specific value, accord-

ing to a just estimation of number, of weight, and of measure.
1 Wait's Law & Pr. 319.

33. When a thing is bailed by way of "commodatum" or for use, what obligation does the borrower or bailee assume?

In this case the temporary right of possession and uses only are transferred, the right of property remaining in the lender ; and the borrower is consequently obliged to render back the identical thing lent, in as good condition as it was when borrowed, subject only to the loss resulting from inherent defects or produced from ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required. 1 Wait's Law & Pr. 319 ; 2 Kent's Com. 574.

34. What degree of care and diligence does the law require on the part of a borrower?

The borrower is bound to the strictest care and diligence to keep the goods in such a manner as to restore them back to the lender ; and he cannot apply the thing borrowed to any other than the very purpose for which it was borrowed ; nor can he permit any other person to use the thing loaned, for such a gratuitous loan is strictly a personal favor. 1 Wait's Law & Pr. 320 ; 2 Kent's Com. 574.

35. Suppose the borrower should be placed in such a situation as to be unable to save the articles borrowed from destruction, as by fire, without abandoning his own goods, and he prefers saving the latter, will he be held responsible for the loss of the former?

He will. In such case he must pay the loss, because he cared less for the article borrowed than for his own property, and gave the preference to his own. 2 Kent's Com. 575.

36. Is inevitable accident sufficient in every case to excuse the borrower from liability for injuries to the thing borrowed?

It is not. Thus, if a person borrows a horse of his friend in order to save his own, and conceals from his friend the fact that he had one of his own equally proper for the occasion, and the borrowed horse is unavoidably injured or killed, he

will be responsible for the loss, for this was a deceit practiced upon the lender, and nothing will exempt him from this responsibility but the fact that he had previously disclosed to his friend the truth of the case, and his disinclination to hazard his own horse. 1 Kent's Com. 576; 1 Wait's Law & Pr. 320.

37. If a person puts a borrowed horse into a ruinous shed which is likely to fall, and the building is blown down during a tempest and falls upon the horse and kills it, is the borrower responsible?

He is; for if the building had been strong, and in good repair, the disaster might not have occurred; and it cannot therefore be taken as a chance, but as the default of him who had the horse delivered to him. 1 Wait's Law & Pr. 320.

38. In a bailment by way of "mutuum" or for consumption is loss by inevitable accident sufficient to excuse the bailee from responsibility?

No; for as the right of property in a bailment of this kind is transferred to the bailee, so also is the risk of loss. If, therefore, the bailee is robbed before he reaches home, or the thing bailed is destroyed by wreck, fire or inevitable accident before it can be used, the bailee must, nevertheless, pay the equivalent which he owes to the bailor at the time appointed. 1 Wait's Law & Pr. 321, 322; 2 Kent's Com. 573.

39. What is meant by a contract of pledge?

Such contract is a bailment or delivery of goods or chattels by one man to another, to be held as a security for the payment of a debt or the performance of an engagement, and upon the express or implied understanding that the thing deposited is to be restored as soon as the debt is discharged or the engagement has been fulfilled. 1 Wait's Law & Pr. 323; 2 Kent's Com. 577.

40. What species of property may be the subject of pledge at common law?

All kinds of personal property that are vested and tangible, and also negotiable paper, may be the subject of pledge; and so may choses in action, resting on written contract, be

assigned in pledge. 1 Wait's Law & Pr. 323 ; 2 Kent's Com. 577.

41. *If one person should pledge the goods of another, has the pledgee any right to detain them as against the owner?*

He has not ; for, as a general rule, one man cannot convey to another a power or right over property which he does not himself possess. But if a man obtains goods under color of a contract intended to transfer the property in the goods to him, and then pledges them, the pledgee will have a lien upon the goods to the amount of his advances. 1 Wait's Law & Pr. 324.

42. *What is the rule as to the degree of care required on the part of the pledgee, respecting the property pledged with him?*

The general rule is, that every person who receives goods and chattels or securities into his possession, by way of pawn or pledge, impliedly undertakes to take the same care of them that a prudent and cautious man ordinarily takes of his own property. 1 Wait's Law & Pr. 326 ; 2 Kent's Com. 578.

43. *May the pledgee lawfully use the articles pledged or pawned?*

If the pawn or pledge be something that will be the worse for use or wear, as clothes or similar articles, the pawnee or pledgee cannot lawfully use it ; but if it will not be the worse for use or wear, as a watch or jewels, the pawnee may use them, though the use is at his peril, for, if he is robbed while wearing them, he will be answerable. So if the pawn be of such a nature that the keeping is a charge to the pawnee, as if it be a cow or a horse, the pawnee may milk the cow or ride the horse, and this will be a recompense for the keeping. 2 Kent's Com. 578 ; 1 Wait's Law & Pr. 327.

44. *Suppose the goods are lost by robbery or unavoidable accident, will the pledgee be answerable for them?*

He will not, if the loss from such causes be duly made to appear, and no act was done, or omitted to be done, inconsistent with the pledgee's duty ; and he may, notwithstanding

the loss and his consequent inability to return the deposit, sue for the recovery of his debt. 2 Kent's Com. 579; 1 Wait's Law & Pr. 326.

45. *If the money for which the goods were pawned is due, and a tender is made by the pawnor to the pawnee before the goods are lost, what then is the liability of the pawnee?*

In this case the pawnee will be answerable for the goods in any event, because, by detaining them after the tender of the money, he becomes a wrong-doer, and a man who keeps goods by wrong must be answerable for them at all events. 1 Wait's Law & Pr. 327.

46. *What course may the creditor pursue, in case the pledgor neglects or refuses to redeem the pledge by payment of the debt it was intended to secure?*

The law, in such case, will not condemn the pledge to remain useless in the hands of the creditor, or suffer it to perish, but will enable the latter, after due notice given to the debtor, and every fair opportunity afforded him to redeem, to sell the pledge and appropriate the proceeds of the sale in liquidation and discharge of the debt, paying over the surplus that may remain to the debtor. 1 Wait's Law & Pr. 325; 2 Kent's Com. 582.

47. *May the pledgee, under any circumstances, appropriate the pledge to his own use and hold it as his own property?*

He may, where the value of the pledge does not exceed the amount of the debt due upon it, and the costs and expenses of a sale; but, in order to make himself the owner of the pledge, he must bar the pledgor's right to redemption by a decree of foreclosure, or by a sale, after due notice to the pledgor. 1 Wait's Law & Pr. 325.

48. *May the pledgor maintain an action against a stranger who unlawfully possesses himself of the goods in the hands of the pledgee?*

He may, since the right of property in the pledge remains in him until foreclosure, forfeiture or sale; but if there is an injury or conversion by a stranger, for which an action will

lie on the part of both the pledgor and the pledgee, a recovery by one ousts or debars the other of his right to recover, for there cannot be a double satisfaction. 1 Wait's Law & Pr. 327; 2 Kent's Com. 585.

49. What is the nature of the bailment or contract, where a thing is hired for a reward?

This is a contract by which the use of a thing, or labor or services about it, are stipulated to be given for a reasonable compensation, express or implied. It includes the thing let, the price or recompense, and a valid contract between the lessor and hirer. 2 Kent's Com. 585; Story on Bailments, §§ 372-377.

50. Does the person hiring gain any property in the thing hired?

The hirer gains a special property in the thing hired, and the lessor to hire an absolute property in the price, and retains a general property as owner in the chattel. 2 Kent's Com. 586.

51. To what degree of care and diligence is the hirer of a chattel bound?

He is bound to ordinary care and diligence, and is answerable for ordinary neglect; for, in this species of bailment, the parties are mutually benefited. The owner or lessor must bear the loss which results from all ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. 1 Wait's Law & Pr. 329; 2 Kent's Com. 586.

52. If a chattel is hired for a particular purpose, has the hirer a right to use it for a different purpose?

He has not. Thus, if a horse is hired to go one particular place, the hirer has no right to go with it to another and different place, either by going beyond the intended place, or by going to another place in a different direction, and if he does go to such other or different place, and a loss occurs during such misuser, the hirer will be responsible in all events. 1 Wait's Law & Pr. 330.

53. A horse is hired for a journey, and, on the road, it falls and is lamed, or in some other accidental manner is injured or killed : in such case who must bear the loss ?

The loss in such case must be borne by the owner ; but if the hirer, by riding immoderately, or at unseasonable hours, and traveling by dangerous and unusual roads, or by leaving the horse by the roadside when he might have put it into a stable under lock and key, has imprudently courted danger and invited robbery, he must himself bear the loss and make full compensation to the owner. 1 Wait's Law & Pr. 330.

54. In an action by the owner or letter of a horse against the hirer for carelessness, negligence or mismanagement of the horse while in the hirer's use, on whom lies the burden of proof ?

The burden of proof in such case is on the owner to establish the carelessness, negligence or mismanagement, and that the injury was caused by the hirer's fault. 2 Kent's Com. 587 ; 1 Wait's Law & Pr. 330.

55. Suppose that chattels have been bailed or let to hire for a certain term, and the bailee does an act which is equivalent to the destruction of the chattels, or which is entirely inconsistent with the terms of the bailment, what effect does such an act have ?

In such case, as when the bailee sells or attempts to sell the chattels or dispose of them in such a manner as to put it out of his power to return them, the act operates like a disclaimer of a tenancy ; the bailment is at an end, the possessory title reverts to the bailor, and entitles him to maintain an action for the value of the chattels. 1 Wait's Law & Pr. 330.

56. In a bailment, where work and labor or care and pains are to be bestowed on the thing delivered, for a pecuniary recompense, what responsibility does the bailee assume ?

He must answer for ordinary neglect of the goods bailed, and apply a degree of skill commensurate with his undertaking. He is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes, and if

he performs the work unskillfully he becomes responsible in damages. 1 Wait's Law & Pr. 335 ; 2 Kent's Com. 588.

57. If an article be delivered to a mechanic to be repaired or materials are delivered to be wrought into new form and shape, and the thing is accidentally destroyed before the work is finished and ready for delivery, without any fault or negligence on the part of the mechanic, on whom falls the loss ?

As a general rule, according to the English law, the entire loss falls upon the owner of the materials ; for he is bound to answer for the work and labor already bestowed. The general rule is liable, however, to be controlled by the custom of the trade. Story on Bailment, § 441 ; 2 Kent's Com. 591.

58. Where an artist or mechanic undertakes to perform a piece of work and executes it so negligently and unskillfully as to render it utterly useless to the employer, can he recover any payment of the latter for such worthless services ?

He cannot ; and in such cases it is always competent for the defendant to show that the work was done in such a manner as to be of no value or service to him. 1 Wait's Law & Pr. 334.

59. May a workman accomplish the work he undertakes through the medium of inferior agents or workmen ?

Ordinarily he may ; but if the work is a work of art or genius, and the contract is founded upon the personal talent and capacity of the artist, he impliedly undertakes to perform the work himself and not intrust it to an inferior agent of less skill and reputation. 1 Wait's Law & Pr. 335.

60. Is the degree of skill and diligence which the law requires from the workman, the same in all cases ?

The skill and diligence of the workman must in all cases be adequate to the business ; but the degree required rises in proportion to the value, the delicacy, and the beauty of the work, and the fragility and brittleness of the material. 2 Kent's Com. 589 ; 1 Wait's Law & Pr. 335.

61. *What degree of care and skill does the law require to be exercised by an attorney or a surgeon?*

An attorney does not undertake that at all events you shall gain your cause, nor does a surgeon impliedly undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, but he undertakes to bring a fair, reasonable and competent degree of skill. 1 Wait's Law & Pr. 336.

62. *If a person selects and employs a common quack, or an unauthorized practitioner, to what degree of care and skill is the latter held responsible?*

He is responsible only for a reasonable and *bona fide* exertion of his capacity. He is bound to exercise such skill as he actually possesses, and if he has done his best and failed, he cannot be made responsible for a want of skill, for it was the employer's own fault to trust an unlearned and unskillful person known not to be regularly and properly qualified. 1 Wait's Law & Pr. 336.

63. *What is the general rule as to the responsibility of an innkeeper for the goods of his guest whom he receives and accommodates for hire?*

At common law the innkeeper is, in general, responsible for the acts of his domestics, and for thefts, and is bound to take all due care of the goods and baggage of his guests deposited in his house or intrusted to the care of his family or servants, without subtraction or loss, day and night. The custody of the goods of his guest is part and parcel of the contract to feed, lodge and accommodate the guest for a suitable reward. 2 Kent's Com. 592.

64. *When does the liability of an innkeeper for the goods of his guest terminate?*

It terminates when the relation between the innkeeper and guest no longer continues ; and that relation ceases when the guest pays his bill and leaves the house with the declared intention of not returning. 1 Wait's Law & Pr. 339.

65. Is it sufficient to excuse an innkeeper from liability, that he was sick or insane at the time the goods of his guest were lost?

It is not; for in such case he is bound to retain and employ trusty servants to secure the goods of his guest. 2 Kent's Com. 593; 1 Wait's Law & Pr. 342.

66. Suppose a person leaves his horse at an inn, without asking for or receiving any accommodation or entertainment for himself, but merely desires to have the horse kept for a night while he is on a visit to a neighboring house, where he is entertained and remains all night to the knowledge of the innkeeper, will such a state of facts be sufficient to constitute the relation of innkeeper and guest?

It will not; and the liability of the innkeeper will be merely that of a bailee of goods for hire; hence, if the horse should be accidentally injured or killed the innkeeper will not be liable for the loss. 1 Wait's Law & Pr. 341.

67. In what respect has the common-law liability of innkeepers been modified by statute in this State?

By an act of the legislature (Laws 1855, ch. 421), innkeepers in this State are exonerated from liability from loss of money, jewelry or ornaments, providing they keep a safe for such articles, and post a notice of the fact in the room of each guest, or give the guest actual notice of it. The act does not apply to a watch and chain and a reasonable sum of money for traveling expenses. 1 Wait's Law & Pr. 341, 343.

68. Who are common carriers?

Common carriers are persons who undertake, as a business for hire or reward, to convey goods and deliver them at a place appointed, and for all who may choose to employ them. Thus, every person who undertakes, with a carriage by land, or a boat or vessel by water, to transport the goods of such persons as may choose to employ him from place to place for hire, is a common carrier. 1 Wait's Law & Pr. 343; 2 Kent's Com. 598.

69. If a person holds himself out to the world as a common carrier, is he bound to accept and carry all such things as he publicly professes to carry ?

He is ; and he must do so for all persons who are ready and willing to pay him his customary hire, provided he has room in his boats, cars, coaches, carts or carriages for their conveyance, and he intends to set out on his accustomed journey. Should he refuse without some just ground, he is liable to an action for his refusal. 1 Wait's Law & Pr. 345 ; 2 Kent's Com. 599.

70. From what time does the carrier's liability commence ?

It commences from the time the goods are received by the carrier for transportation. This reception of them may be specific or general and according to the usage of his business, and it may be actual or constructive. In order, however, to charge the carrier with the goods, there must be a delivery of them into his custody, either to the carrier, personally, or to his agent or servant, or to some one acting in his behalf and authorized to receive them. 1 Wait's Law & Pr. 348.

71. What is the degree of liability of a common carrier of goods ?

He is responsible for the safety of the goods intrusted to him for carriage, in all events, and from every injury which arises in any other way than by the act of God or of public enemies. Thus he will be liable though he should be robbed by force committed by a great multitude. 1 Wait's Law & Pr. 349 ; 2 Kent's Com. 602.

72. Suppose the loss of goods in the hands of a carrier happens only in part through human agency, is the carrier excused ?

He is not ; nor is he excused where his previous neglect brings the goods into danger, or in any way contributes to their loss, as where his delay exposes them to a flood that might have been escaped by his diligence. 1 Wait's Law & Pr. 350.

73. Goods were delivered to a steamboat company, for transportation, and after the boat with the goods had arrived at the place of its destination, but while the goods were still in the carrier's custody, a fire broke out in the city, and extended to and burned and destroyed the boat and the goods ; was the carrier liable in this case for the value of the goods ?

He was ; because a loss which arises from an accidental fire, or the conflagration of a city, without any default whatever on the part of the carrier, does not furnish him with any excuse, nor fall within the exception as an act of God. 2 Kent's Com. 602 ; 1 Wait's Law & Pr. 350.

74. From the liability of what losses will the carrier be excused, on the ground that they were caused by the public enemy ?

From those only which are sustained from persons with whom the State or nation is at war ; and pirates on the high seas, who are "the enemies of all mankind." It will not be sufficient excuse that the loss was caused by thieves, or robbers, or mobs, or rioters, insurgents or rebels. 2 Pars. on Cont. 163 ; Story on Bailm., §§ 25, 526.

75. When does the liability of a common carrier terminate ?

Not until he fully performs his contract by safely delivering the goods received by him ; for he is legally bound not merely to carry them to their destined place, but also to deliver them there to the bailor, or to such person as the bailor may direct. 1 Wait's Law & Pr. 352 ; 2 Pars. on Cont. 183.

76. Within what time must the delivery of the goods be made ?

The delivery of the goods by the carrier must be made within what shall be a reasonable time, judging from all the circumstances of the case ; and within the proper hours of business, when the goods can be received and properly stored. 1 Wait's Law & Pr. 352 ; 2 Pars. on Cont. 183.

77. Suppose the consignee refuses to receive the goods, or cannot receive them, or is dead, or absent, will this be sufficient to excuse delay in delivery ?

It will ; but the carrier in such case will not be absolved

from all duty or responsibility ; for he is still bound to make every reasonable effort to place the goods in the hands of the consignee, and if he fails, then to take care of the goods for the owner, by holding them himself, or lodging them with suitable persons for him ; and such persons then become bailees of the owners of the goods. 2 Pars. on Cont. 185 ; 1 Wait's Law & Pr. 354.

78. May a carrier limit his liability by an express contract, and, if so, to what extent may he carry this limitation ?

It is now settled that he may limit his liability as an insurer of the goods, and he may, by contract, exempt himself from responsibility for losses arising from the want of diligence on the part of his servants and agents. He cannot, however, exempt himself from liability from his own willful and gross negligence. 1 Wait's Law & Pr. 357.

79. Suppose a common carrier publishes a general notice, as, for example, "All baggage at risk of owners," will this be sufficient to screen him from liability ?

It will not. The sender may disregard the notice, and the baggage will be at the risk of the carrier ; or he may expressly refuse to be bound by it, and insist that his baggage shall be carried under the responsibility which the law creates ; and if the carrier refuses to take the goods he will render himself liable to an action. 2 Pars. on Cont. 244 ; 1 Wait's Law & Pr. 357.

80. Is the liability of a common carrier, as to passengers, the same as his liability as to goods ?

It is not. In the former case he is liable only where the injury results from his own negligence ; but, in the latter case, he insures the owners of all the goods he carries against all loss or injury whatever that does not come from the act of God or the public enemy. 2 Pars. on Cont. 219 ; 2 Kent's Com. 600.

81. Upon what ground is this distinction founded ?

The carrier of goods has absolute control over them while they are in his hands, and he may, therefore, secure them in

any way in his power ; but the carrier of passengers must leave them to some power of self-direction, some care of themselves ; hence, it would be wrong to hold him to as absolute a responsibility as in the case of goods. 2 Pars. on Cont. 223.

82. In an action against a carrier, would it be a sufficient defense that the injury to the passenger was caused by the negligence of the carrier's agent or servant ?

It would not, for the carrier is liable for the smallest negligence, not only in himself, but in his agent ; and even though the negligence be willful on the part of the latter. 2 Kent's Com. 601 ; 2 Pars. on Cont. 220.

83. May a common carrier of passengers limit his liability by contract ?

In this State he may so relieve himself from liability for the negligence of his agents and servants ; even for gross negligence, where the passenger is willing to accept the risk for a consideration. *Wells v. New York Central R. R. Co.*, 24 N. Y. (10 Smith) 181.

84. In providing vehicles for passengers, what degree of care is the carrier bound to exercise ?

He is bound, absolutely and irrespective of any question of negligence, to provide safe and roadworthy vehicles, and, where a passenger was injured by an accident which was caused by a crack in an iron axle of a railroad car, it was held that the company was liable, although the defect could not have been discovered by any practical mode of examination. 1 Wait's Law & Pr. 355.

85. Is a common carrier of passengers liable for the baggage of his passengers ?

He is. The law regards him as an insurer of the baggage of his passengers, and he is responsible for any loss which is not occasioned by inevitable accident, or the enemies of the country. And to render him thus liable it is not necessary that any thing should be paid specifically for baggage, because the payment of the passenger's fare includes the carriage of his baggage. 1 Wait's Law & Pr. 356.

86. Suppose the passenger retains his baggage in his own exclusive custody, is the carrier then liable for its loss or injury?

He is not. In assuming the custody and control of his baggage the passenger also assumes the risk of its loss, and the carrier is not answerable. 1 Wait's Law & Pr. 356.

87. State briefly the duty which the law requires on the part of a common carrier to be performed toward his passengers.

It is his duty to receive all passengers who offer ; to carry them the whole route ; to demand no more than the usual and established compensation ; to treat all his passengers alike ; to behave to all with civility and propriety ; to provide suitable carriages and means of transport ; to maintain a reasonable degree of speed ; and to have servants and agents competent for their several employments, and for the default of any of his servants and agents in any of the above particulars or generally, in any other points of duty, the carrier is directly responsible, as well as for any circumstances of aggravation which attended the wrong. 2 Pars. on Cont. 228 ; 2 Kent's Com. 601.

88. Has the common carrier a right to prescribe rules and regulations as conditions to be observed by the passengers ?

He has a right to prescribe reasonable rules and regulations in receiving passengers and in protecting them from annoyance on their arrival and departure. Thus, he is not bound to receive or carry drunken or disorderly persons. He has a right to insist that the fare be prepaid, and that each passenger shall show his ticket on request ; and for a refusal to pay he may refuse to receive a passenger, or for a refusal to show his ticket he may put him off, using no unnecessary violence. 2 Pars. on Cont. 229.

89. May the use of a ticket on a railway be limited by the carrier to a particular train or day ?

A common carrier of passengers may, by agreement, provide that a passage shall be made within a time specified, and in one continuous trip, and if he does so, the ticket cannot be

used any day after the time specified has elapsed. *Barker v. Coflin*, 31 Barb. 556.

90. Does the common carrier of goods acquire a lien on them for his freight?

He does ; and if the freight is withheld he may retain the goods, and obtain his freight from them in any of the ways in which a party enforces a lien on personal property. 1 Wait's Law & Pr. 361 ; 2 Pars. on Cont. 207.

91. What is the duty of a common carrier of goods in case he cannot find the consignee or learns that he is a swindler and would cheat the consignor?

In such case the carrier is bound to protect the owner and consignor, and for that purpose should hold the goods or store them in some proper way for his use. The rule is the same if the consignee refuses to receive the goods. 2 Pars. on Cont. 210.

92. If a carrier should be induced to deliver goods to the consignee, by a false and fraudulent promise of the latter that he would pay the freight as soon as they were delivered, would the delivery in such case amount to a waiver of the carrier's lien?

It would not ; and the carrier may disaffirm the delivery, and maintain replevin to recover possession of the property. 1 Wait's Law & Pr. 366 ; 2 Pars. on Cont. 207.

93. In an agreement to carry a passenger and his baggage, for what amount of baggage will the common carrier be held liable?

Only for ordinary baggage, or such articles of necessity and personal convenience as are usually carried by passengers. He will not be liable for goods carried by way of merchandise, nor for a larger sum of money than the passenger might reasonably take on such a journey for his expenses. 1 Wait's Law & Pr. 356 ; 2 Pars. on Cont. 254.

94. In what way is the liability of a common carrier affected, where the loss of the goods has in any way been contributed to by the conduct of the bailor or consignor?

In such case the common carrier is not liable. Thus, if

the owner is guilty of any fraud or imposition, as by concealing the value or nature of the goods, and either does or says any thing which tends to mislead the carrier in respect thereto, or puts him off his guard by creating the impression that the goods are of less value than in truth they are, or otherwise prevents him from exercising proper precautions in view of the importance of the hazard, the carrier will not be responsible. 1 Wait's Law & Pr. 351.

CHAPTER XII.

NEGOTIABLE PAPER.

1. Define a bill of exchange?

It is an unconditional written order from A to B, directing him to pay a sum of money therein mentioned to A, or his order, or to C, a third person, or his order. Edwards on Bills & Prom. Notes, 41.

2. Define a promissory note?

It is an unconditional promise in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer. The person who signs the note is called the maker. Edwards on Bills & Prom. Notes, 124.

3. Define a check?

It is in effect a bill of exchange drawn on a banker, payable to order or bearer, on demand. Edwards on Bills & Prom. Notes, 58.

4. Describe the parties to a bill of exchange?

The parties are : 1. He who draws it, called the *drawer*; 2. He to whom it is addressed, called the *drawee*, before acceptance of the bill, but afterward the *acceptor*; and 3. He to whom the money is to be paid, called the *payee*. There are also, when the bill is made payable to *order*, other parties

who are *indorsers* of the bill, the holder in such case being the indorsee. Edwards on Bills & Prom. Notes, 41.

5. State the relative liabilities of the parties to a bill of exchange.

The acceptor is primarily liable, and is the principal, all the other parties being merely sureties for him. But the other parties are not *as between themselves* merely co-sureties, but each prior party is a principal in respect to each subsequent party. Edwards on Bills & Prom. Notes, 44.

6. What is the theory upon which the use of bills of exchange as commercial currency is based?

The theory of a bill of exchange is, that the drawer has funds in the hands of the drawee equal in amount to the sum which he orders paid ; and that the bill of exchange is an assignment to the payee of a debt due from the drawee to the drawer. Acceptance by the drawee is an acknowledgment that he has funds of the drawer in his hands. Edwards on Bills & Prom. Notes, 43.

7. What is the difference between an inland and a foreign bill of exchange?

Foreign bills of exchange are such as are drawn by a person in one State or country upon a person in another State or country. Inland bills of exchange are such as are drawn upon a person residing in the same State with the drawer, or are drawn and payable in the same State or country though accepted abroad. Edwards on Bills & Prom. Notes, 47.

8.. What is meant by an accommodation bill or draft?

An accommodation bill or draft is one drawn upon a party who has no funds of the drawer in his hands, but who accepts it for the accommodation of the drawer, in pursuance of a previous agreement. Edwards on Bills & Prom. Notes, 43.

9. What presumption of law is raised by the acceptance of a bill of exchange?

Acceptance of a bill of exchange raises a presumption of

funds in the hands of the acceptor, which is conclusive as between the drawee and any *bona fide* holder, and which is sufficient to support an action brought against the acceptor by the drawer, on a bill payable to his own order. Edwards on Bills & Prom. Notes, 44.

10. If an infant join with an adult in a bill of exchange, can either be sued on the bill?

The adult may be sued, but the infant cannot. Edwards on Bills & Prom. Notes, 67.

11. In what manner may a married woman make her separate estate chargeable with the payment of a bill of exchange or promissory note? *See Case of 1884 Bank.*

By a written expression of an intent that her estate shall be so charged. *Corn Exchange Bank v. Babcock*, 42 N. Y. (3 Hand) 613.

12. What will be the character of the liability of an executor on a negotiable note, signed by him as executor, and given in the discharge of his duties as such?

The liability of the executor will depend on the custody of the note on its maturity. If in the hands of a third party, who received it before it became due, the executor will be held personally liable, regardless of the amount of the assets of the estate for which he acts; but, if the note has not passed out of the hands of the payee, the maker may show that there is, in fact, a deficiency in assets, and, consequently, no consideration to support the note. Edwards on Bills & Prom. Notes, 78.

13. What would have been the executor's liability if he had limited the general language of his promise to pay by adding the words, "out of the estate of A?"

He would then have been liable only in his representative capacity. The words of limitation would render the instrument no longer negotiable as a promissory note. Edwards on Bills & Prom. Notes, 78.

14. In what manner may an agent, specially authorized for that purpose, draw, accept or indorse a bill for another, and avoid all personal liability thereon?

He may bind his principal, and at the same time avoid all

personal liability by writing the name of his principal first, and writing his own name under it, with words preceding it expressing the fact that he signs for another, as A B, by C D, his agent, or A B, *per procuration* C D. Edwards on Bills & Prom. Notes, 83.

15. *A principal gives to his agent full powers to manage his estate, real and personal, and authorizes him to do all lawful acts concerning his business and affairs, of what nature or kind soever, and, under this authority, the agent makes a promissory note in the name of his principal; against whom only can such note be enforced?*

The note can be enforced against the agent only. A principal is bound by the acts of his agent only where the latter acts within the scope of his authority ; and the general words in the power of attorney conferred upon the agent only general power to carry into effect the special purposes for which the power was given, and do not confer authority to sign notes in the name of his principal ; and it is a general rule that, where an agent makes a contract in the name of his principal, and the principal is not bound by it for want of authority in the agent to make the contract, the agent is personally liable on it. Edwards on Bills & Prom. Notes, 87, 90.

16. *Can a person, who has been made a party to a negotiable note by the forgery of his signature, be held liable thereon?*

He cannot. Edwards on Bills & Prom. Notes, 94.

17. *A member of a partnership makes a negotiable note, for the accommodation of a third party, without the knowledge or consent of his partners. The note is afterward transferred to one who has no knowledge of the circumstances under which it was executed; can the other partners set up, as a defense to an action on the note, that it was made without authority and out of the usual course of business?*

They cannot defeat a recovery by such a defense. Edwards on Bills & Prom. Notes, 106.

18. *What would it be necessary for the holder to prove, in such a case, in order to recover?*

It would be necessary to establish the fact that he received

the note *bona fide*, and for a valuable consideration. Edwards on Bills & Prom. Notes, 106.

19. What is the legal effect of a note made payable to the order of the maker, or to the order of a fictitious person, and afterward negotiated?

It is provided by statute that notes so made and negotiated shall have the same effect and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer. Edwards on Bills & Prom. Notes, 129 ; 1 Wait's Law & Pr. 389.

20. In what manner must the payee of a note be designated in order to render it negotiable?

The usual mode of rendering a note transferable is by drawing it payable to a certain person, *or order or bearer*, or to the order of the drawer, or to bearer generally. Where a note is not made payable to any person by name, adding "or bearer" or the words "or order," it must bear upon its face terms of equivalent import in order to make it negotiable. Edwards on Bills & Prom. Notes, 165 ; 1 Wait's Law & Pr. 403.

21. What will be the effect of an indorsement by John Doe of a note made payable to John Doe or bearer?

The indorsement will serve only to make John Doe liable as an indorser, but will not add to the negotiability of the note, as all notes payable to a certain person or bearer, or to bearer only, are transferable without indorsement. 1 Wait's Law & Pr. 404 ; Edwards on Bills & Prom. Notes, 165.

22. If A gives a note, payable in cash or specific articles, to B, or order, is the note negotiable?

It is not ; no note is negotiable of which the maker has an election to pay in money or to some other act. To be negotiable a note must be payable in money. Edwards on Bills & Prom. Notes, 139 ; 1 Wait's Law & Pr. 412.

23. What is the effect of including in a note or bill of exchange a limitation that it be paid out of a certain fund?

The effect of the limitation will be to destroy the negotia-

bility of the note or bill. Edwards on Bills & Prom. Notes, 143 ; 1 Wait's Law & Pr. 396.

24. *A makes and delivers two promissory notes, one payable on the day of his marriage and the other six months after the death of his father, are both notes equally negotiable?*

They are not. The first note would not be negotiable for the reason that the promise to pay is conditioned upon the happening of an uncertain event ; while the second note may be negotiable, as the payment is made to depend upon an event which is certain to arrive, and uncertain only in regard to the time when it will take place. Edwards on Bills & Prom. Notes, 141 ; 1 Wait's Law & Pr. 394.

25. *A note is made payable thirty days from date, but the date of making the note is no where specified, what is the effect of the omission on the validity of the note?*

The omission of the date of making a note has no effect on its validity, for it will be intended that it was dated on the day on which it was made. Edwards on Bills & Prom. Notes, 150 ; 1 Wait's Law & Pr. 399.

26. *Will the payment by a bank of a post dated check, before the day upon which it was dated have the effect of defeating the right of the assignee of the fund to demand the return of the deposit?*

It will not. The money so paid remains to the credit of the drawer of the check, and the assignee in good faith of this fund may maintain an action against the bank for its recovery. 1 Wait's Law & Pr. 399.

27. *Where there is a discrepancy between the amount stated in the margin, and the amount mentioned in the body of the note, which statement must prevail?*

The amount stated in the body of the note, as the words there used are a part of the note, while the figures used in the margin are only a memorandum. Edwards on Bills & Prom. Notes, 152 ; 1 Wait's Law & Pr. 400.

28. Are there any valid reasons for the insertion of the words "for value received," in a negotiable note?

There are none. The law implies that a negotiable note has been given for value where no consideration is expressed; and, as between the original parties, the consideration may be inquired into whether express or otherwise. Edwards on Bills & Prom. Notes, 169; 1 Wait's Law & Pr. 404.

29. What is the effect of payment by note or bill of exchange?

When a negotiable bill or note is delivered to a creditor, it operates as an extinguishment of the original debt to the extent of barring a recovery on the original demand until the instrument is not only due, but is also either proven lost, or is delivered up and canceled on the trial. 1 Wait's Law & Pr. 409; Edwards on Bills & Prom. Notes, 196.

30. How would you proceed to recover on a lost negotiable note or bill of exchange?

I would, 1. Prove the existence of the note or bill, its amount, negotiability, ownership and loss; and, 2. Execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties, to be approved by the court, conditioned to indemnify the adverse party against all claims by any other person on account of such note or bill, and against all cost and expenses by reason of such claim. Edwards on Bills & Prom. Notes, 279.

31. What precautionary measures would you advise if a bill of exchange, note or check, drawn payable to bearer or order, and indorsed in blank, had been lost or stolen from your client?

I should advise him to give immediate notice to all the parties not to pay the money thereon to any person but himself; and also to insert a notice in the newspapers cautioning all persons against taking or buying the stolen paper. Edwards on Bills & Prom. Notes, 307.

32. What are the presumptions of law in favor of negotiable paper?

The law presumes, 1. A good consideration until the

contrary appears ; 2. That the holder is the owner until circumstances of suspicion are shown ; 3. That, if indorsed, the indorsement was made before it became due ; 4. That the party in possession took the same in the usual course of business for value ; 5. That the maker of a note is the primary debtor ; and, 6. That the acceptor of a bill of exchange is primarily liable thereon. Edwards on Bills & Prom. Notes, 312.

33. *What two contracts are included in every unqualified indorsement ?*

Every unqualified indorsement is, 1. An assignment of the bill or note by the indorser ; and, 2. An executory contract in which the indorser agrees, upon certain conditions, to pay the amount of the bill or note himself. Edwards on Bills & Notes, 284.

34. *What contracts of warranty are implied in the indorsement ?*

1. A warranty that the instrument indorsed is not forged ; and, 2. A warranty of the existence and legality of the contract which the indorser undertakes to assign. Edwards on Bills & Notes, 289.

35. *A leaves with his agent certain blank promissory notes, bearing his indorsement on the back, with the understanding that they are to be filled up and used by the agent in the course of his business. If the notes are filled up by the agent and used for purposes other than that for which they were designed, will the paper be valid in the hands of a subsequent holder ?*

It will be valid in the hands of a subsequent holder who receives it in good faith and for value. The indorsement is in effect a letter of credit for an indefinite sum, and the indorser, by delivery, authorizes the agent to fill it up in proper form. Edwards on Bills & Prom. Notes, 253.

36. *Where a note or bill is made payable or indorsed to more than one person, what further indorsement is necessary to transfer the note or bill to other parties ?*

If the persons to whom the note or bill is made payable

or indorsed are not partners, all of them must unite in transferring the instrument; but if the persons to whom it is payable or indorsed are copartners, either of the partners may make the transfer by indorsement. Edwards on Bills & Prom. Notes, 254.

37. What is the effect of the indorsement and transfer of a note overdue?

The indorsement and transfer operate as a renewal of the note, which then becomes payable, within a reasonable time, on demand. Edwards on Bills & Prom. Notes, 261.

38. Explain the meaning of the terms "indorsement in blank" and "indorsement in full."

Where an indorser simply writes his name on the back of negotiable paper, it is called an indorsement in blank, or a blank indorsement, and when the indorsement mentions the name of the person in whose favor it is made, it is called an indorsement in full. Edwards on Bills & Notes, 267.

39. What is the difference in the effect of the two indorsements?

The effect of an indorsement in blank is to make a bill of exchange or negotiable note transferable by delivery, the bill or note being then equivalent to one payable to bearer. The effect of an indorsement in full is to restrict the right to demand the payment of the bill or note so indorsed to the indorsee, or person to whom it is ordered paid, and to render it transferable, as negotiable paper, only by adding his indorsement in writing. Edwards on Bills & Notes, 268.

40. When a note is indorsed in blank, and, afterward, several indorsements in full are added, will it be necessary for the holder of the note to connect his title with that of his immediate indorser, in order to recover on the note?

It will not. He may strike out all the indorsements except the first, and make title under that. Edwards on Bills & Prom. Notes, 275.

41. Can the defense of usury be interposed to an action brought upon a negotiable note or bill of exchange, by an innocent holder for value?

It cannot. The Revised Statutes exempt all bills of exchange or negotiable notes so held from the operation of the general provisions of the usury laws. Edwards on Bills & Prom. Notes, 350.

42. State the general rule as to the effect of illegality of consideration on the validity of a negotiable note in the hands of a bona fide holder

Where the legislature has declared that the illegality of the contract or consideration shall make the note void, the note will be invalid in the hands of a *bona fide* holder ; but, unless it has been so expressly declared by the legislature, illegality of consideration will be no defense against a *bona fide* holder, without notice and for a sufficient consideration, unless he obtained the note after it became due. Edwards on Bills & Prom. Notes, 370.

43. Who is a bona fide holder of negotiable paper?

One who acquires the same before it becomes due, in good faith and for value.

44. When is a negotiable note said to carry the equities with it, or, in other words, to be taken subject to all the equities with which it may be encumbered?

When it is still in the hands of the payee ; or when it is taken by subsequent parties after maturity ; or with notice of facts going to impeach its validity or to diminish the amount recoverable thereon ; or where it has not been received in the usual course of business, for a valuable consideration. Edwards on Bills & Prom. Notes, 371, 373.

45. What is the engagement of the drawer of a bill of exchange?

The drawer of a bill of exchange engages, 1. That the drawee is to be found at the place where he is described to reside ; 2. That the drawee is capable of accepting the bill and binding himself for its payment ; 3. That the drawee

shall accept unconditionally, according to the tenor of the bill ; and 4. That the drawee shall pay the bill at the place designated therein. Edwards on Bills & Prom. Notes, 380, 383.

46. What is the contract of the indorser of a bill of exchange ?

The indorser of a bill of exchange is substantially a new drawer, and is consequently liable on a similar contract. Edwards on Bills & Prom. Notes, 384.

47. What reasons can you give why the holder of a bill of exchange should present it to the drawer for acceptance at the earliest day possible ?

For the reason that, if accepted, the holder acquires the additional security of the acceptor ; and, if not accepted, the holder may immediately resort to his remedy against the drawer and indorsers. A further reason is found in the rule of law which requires that the payee or holder shall use reasonable diligence in presenting a bill of exchange for acceptance, or the drawer will be discharged from all liability thereon. Edwards on Bills & Prom. Notes, 387.

48. What is a certified check, and what is its peculiar value over a similar check which is uncertified ?

A certified check is one which has indorsed upon its back the certificate of the teller of the bank where it is payable that it is good. This certificate is an admission that it is drawn on funds, and an undertaking that it shall be paid on presentation ; and the act of giving it renders the bank liable for the amount of the check, irrespective of the fact that the drawer has withdrawn his funds prior to its presentation for payment. Edwards on Bills & Prom. Notes, 406.

49. Is a parol acceptance of a bill valid in this State ?

It is not. Edwards on Bills & Prom. Notes, 389.

50. A makes an unconditional promise in writing to accept any bill of exchange which may be drawn upon him by B, during the present year, in a sum not exceeding \$1,000 in any one month. What is the legal effect of this promise ?

The promise is in effect an actual acceptance in favor of

every person who, upon the faith thereof, has received, for a valuable consideration, a bill drawn according to the terms of the promise. Edwards on Bills & Prom. Notes, 410.

51. *The holder of a bill of exchange, for a good consideration, executed and delivered to the acceptor a release under seal, and the next day transferred the bill to a third party for a valuable consideration. Will the release be a good defense to an action on the bill?*

The release will be a good defense only as between the parties, and will not affect the rights of a purchaser for value, who takes the bill without notice and before due. Edwards on Bills & Prom. Notes, 436.

52. *In what cases will the failure on the part of the payee to notify the drawer and indorsers of the presentment of a bill of exchange to the drawee, and its non-acceptance by him, fail to release the drawer and indorsers from liability thereon?*

An omission to give the drawer and indorsers notice of the non-acceptance of a bill of exchange will not discharge them, where, from the circumstances of the case, they could not have been injured by the omission. Nor will they be discharged where the payee has, subsequent to the presentment and refusal, transferred the bill to a *bona fide* indorsee for value, who took the same before maturity and without notice of its dishonor. Edwards on Bills & Notes, 446, 447.

53. *In what manner may notices of non-payment and non-acceptance be served?*

By depositing the same in the post-office, directed to the drawer or indorser to be served at his residence or place of business, with the postage thereof prepaid. Edwards on Bills & Notes, 456.

54. *Within what time in ordinary cases must such notices be served?*

As a general rule they must be served on the day of demand or the first *business* day thereafter. Edwards on Bills & Notes, 459.

55. *What is a protest?*

A protest is a formal and solemn declaration in writing, made by a notary, setting out a copy of the bill or referring to it as annexed, and stating that payment or acceptance has been demanded and refused, the reason given for the refusal if any, and the purpose and object of the protest. Edwards on Bills & Prom. Notes, 461.

56. *When is presentment for payment necessary in order to perfect a right of action on a bill or promissory note?*

As against the maker of a note or the acceptor of a bill of exchange, a demand for payment is not necessary to perfect a right of action on the bill or note ; but as against the drawer or indorsers of a bill, or the indorsers of a note, due demand for payment, and notice of non-payment are conditions precedent to the right of action. Edwards on Bills & Prom. Notes, 483.

57. *In what cases will an omission to make a demand for payment fail to operate as a waiver of a right of action against an indorser of a promissory note?*

1. Where the maker of a note has absconded ; 2. Where the maker is a seaman on a voyage ; 3. Where the maker has no known residence or place of business where the note can be presented for payment ; and 4. Where the maker, after the making of the note, and before its maturity, has changed his residence permanently to another State. Edwards on Bills & Prom. Notes, 486.

58. *When a demand of payment is necessary, where should it be made?*

If the note or bill specifies a place of payment the demand should be made at the place specified ; otherwise, at the residence or place of business of the maker or acceptor. Edwards on Bills & Prom. Notes, 495.

59. *If a note is dated on the thirty-first of August, and is payable six months after date on what date will it fall due?*

It will be due on the last day of February or including

days of grace, on the third of March. Edwards on Bills & Prom. Notes, 515.

60. *If a note falls due on Thursday, and the maker is allowed the usual days of grace, what will be the last day upon which payment may be made?*

Upon Saturday, unless that day is a legal holiday, in which case payment must be made on Friday. Edwards on Bills & Prom. Notes, 529.

61. *Is it necessary that there should be any consideration, to support a waiver of notice to an indorser, of the non-payment of a note?*

It is not. The waiver is not a new contract, and consequently requires no consideration to support it. Edwards on Bills & Prom. Notes, 634, 635.

62. *Is it necessary that notice of non-payment should be given to a person who has indorsed an absolute guaranty of payment on the back of a negotiable note, in order to avoid discharging him from liability as a guarantor?*

It is not. The contracts entered into by the guarantor and the indorser of a negotiable note are wholly dissimilar. The contract by the guarantor is an unconditional undertaking that the note shall be paid, while the contract of an indorser is to pay the note after due demand and notice of non-payment. Edwards on Bills & Prom. Notes, 630.

CHAPTER XIII.

INSURANCE.

1. *Define insurance, and give a description of the terms employed in the contract.*

Insurance (also called assurance) is a contract whereby, for an agreed premium, one party undertakes to indemnify the other against loss on a specified subject by specified perils.

The party agreeing to make the indemnity is usually called the *insurer*, or *underwriter*; the other, the *insured* or *assured*; the agreed consideration, the *premium*; the written contract, a *policy*; the events insured against, *risks* or *perils*; and the subject, right or interest to be protected, the *insurable interest*. Bouv. Dict. ; 1 Phillips on Ins., §§ 1-5.

2. Is it essential, in a contract of this kind, that the insured party should have an insurable interest in the thing insured?

It is, for otherwise the policy is a mere wager, and, as such, invalid. Wagering policies are mere games of chance. Buchanan v. Ocean Ins. Co., 6 Cow. 318, 331.

3. What is the undertaking of the insurer in a contract of marine insurance?

By this contract the insurer undertakes, for a stipulated premium, to indemnify the insured against certain perils, or sea-risks, to which his ship, freight and cargo, or some of them, may be exposed on a certain voyage, or during a fixed period of time—the property, the perils and the period of time all being defined, in part by the instrument of agreement, and in part by the law. 3 Kent's Com. 253 ; 2 Pars. on Cont. 350.

4. Is it necessary that the agreement to insure should be in writing?

Though the agreement is usually in writing, it is not necessary that it should be, unless the act of incorporation of the insurers requires it to be so. It may be oral only, or it may be made by an agreement to insure, entered and subscribed on the books of the insurers in any manner usual in that office. 2 Pars. on Cont. 350 ; 3 Kent's Com. 257, note 3.

5. In what way is insurance generally effected in this country?

During the colonial government of this country the business of insurance was almost entirely carried on by private individuals, each taking singly for himself a risk to the amount of his subscription ; but now the business is carried on almost

exclusively by incorporated companies. 3 Kent's Com. 256, 257; 2 Pars. on Cont. 350.

6. What is the consideration for the promise of insurance?

The consideration is the premium paid by the insured; and it is sufficient to bind both parties to the contract, if it be subscribed only by the insurers; the insured, however, always having his option as to whether he will put his property under the risks insured against. 2 Pars. on Cont. 351.

7. Will any writing be assumed to constitute a part of the policy without being embodied in it?

Not unless referred to as such in the body of the instrument, or signed as such by the party upon whom it imposes an obligation. Thus, a paper is not made a part of a policy by merely being folded up with it, or even wafered to it; and things said or written by either party, or by both, while negotiating for the policy, whatever their importance, forms no part of the policy unless written therein or specifically referred to. 2 Pars. on Cont. 352.

8. May insurance be effected through an agent?

Insurance may be and usually is effected through agents, but the agent must have full power to do so. This power may be expressly given, or may be derived from the circumstances of the case, or from usage; but a mere general authority, though it be to act in relation to the ship or cargo, is not sufficient. 3 Kent's Com. 260; 2 Pars. on Cont. 352.

9. Suppose an agent effects an insurance for his principal without his knowledge or authority, and the principal afterward adopts the act, is the insurer bound?

He is; and the bringing of an action on the policy by such principal, in his own name, has been said to be sufficient ratification. 3 Kent's Com. 260; 2 Pars. on Cont. 353.

10. Who may be insured?

All persons, whether aliens or natives, may be insured; the only prominent exception to the general rule being an

insurance for the benefit of an alien enemy. Aliens who are not enemies may make contracts of insurance as fully, to all intents and purposes, as citizens or subjects of the country in which the policy is made. 2 Pars. on Cont. 360; 3 Kent's Com. 253.

11. What is the general rule as to the description of the insured property in the policy?

The property insured should be set forth in the policy with sufficient distinctness; but, where there is no fraud or concealment on the part of the insured, his interest, which he intended to bring within the terms of the policy, will be brought within it, even by a liberal construction; and a mistake in the description will seldom prevent this construction. 2 Pars. on Cont. 362.

12. In a marine policy, is it necessary that the name of the party really interested as the insured should always appear on the face of the instrument?

Though some one must be named as the insured, it is not always the party really interested; for the policy may be made for the benefit of A, or *of whom it may concern*, or may contain some indication of the interest of another party than the one named. 2 Pars. on Cont. 361; 1 Phillips on Ins., § 28.

13. If a certain ship be specified in a policy of insurance, may another ship be substituted during a voyage?

If the ship be specified in the policy, it becomes part of the contract, and no other ship can be substituted without necessity; the cargo may, however, be shifted from one ship to another, if it be done from necessity, and the insurer of it will still be liable. 3 Kent's Com. 257.

14. Give the distinction between open policies and valued policies?

Where the value of the property insured, as agreed upon by both parties, is not stated in the policy, but must be proved by evidence after the loss occurs, such a policy is called an *open policy*. But, if the value of the insured property, as agreed upon by the parties, is stated in the policy, it is then

called a *valued policy*. 2 Pars. on Cont, 368, 369 ; 3 Kent's Com. 273.

15. What is meant by a double insurance ?

A double insurance, is where, by different policies, the same interest of the same parties in the same subject-matter is insured against the same risks ; and it is over-insurance if the whole amount insured by all the policies exceeds the whole value of the property insured. 2 Pars. on Cont. 371 ; 3 Kent's Com. 280.

16. What is the nature of the contract of re-insurance ?

After an insurance has been effected, the insurer may have the entire sum he has insured, re-insured to him by some other insurer ; the object of which is to indemnify himself against his own act. If he gives a less premium for the re-insurance, all his gain is the difference between what he receives as a premium for the original insurance, and what he gives for the indemnity against his own policy. If he gives as much for re-insurance, he gains nothing by the transaction ; and if he gives a higher premium, as insurers sometimes do, to cover a dangerous risk, he becomes a loser by his original insurance. 3 Kent's Com. 279 ; 2 Pars. on Cont. 373.

17. What are the risks usually insured against in marine policies ?

As a general rule, the policy sweeps within its inclosure all the maritime perils that the thing insured can meet with on the voyage, however strange or unexpected. This will include perils of the sea, fire, barratry, theft, robbery, piracy, capture, arrests and detentions. 3 Kent's Com. 291 ; 2 Pars. on Cont. 374.

18. Would the ignorance, inattention, or negligence of the master or mariners, be regarded as one of the perils of the sea ?

It would not, because those words apply only to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. The

imprudence, or want of skill in the master, may have been unforeseen, but it is not a fortuitous event. 3 Kent's Com. 300.

19. *Mention some of the ordinary risks of a voyage, for losses from which insurers will not be held liable?*

Among these are damages resulting from the ordinary employment of the ship, or the inherent infirmity of the article, as the loss of an anchor by the friction of the rocks, or the wear and tear of the equipment of the ship, or her destruction by worms, or the diminution of liquids by the ordinary leakage to which they are naturally subject. 3 Kent's ~~Com.~~ 300; 2 Pars. on Cont. 375.

20. *Is damage done to a ship by rats one of the casualties comprehended under perils of the sea?*

The question is not fully settled, but the better opinion seems to be, that the insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity. 3 Kent's Com. 301.

21. *Suppose a ship insured against fire is burned purposely by the master, as the only means of saving her from capture by a public enemy, are the insurers liable?*

They are; for it would be the duty of the master to the State to burn her under such circumstances, nor are the insurers damaged thereby if they insure against capture. If the ship be not insured against capture, it may be doubted whether the insurers would be liable. 2 Pars. on Cont. 377.

22. *If a vessel at sea is not heard from for a long time, what is the presumption of law as to its fate?*

It is presumed to have perished by perils of the seas. By some policies it is provided that a vessel not heard from for a certain time shall be presumed to have been lost. In the absence of any provision of this sort, the length of time which will be the ground of this presumption will evidently depend upon the distance and particular circumstances. 1 Phillips' Ins., § 1099; 2 Pars. on Cont. 376.

23. Under the clause for indemnity for loss by "pirates, robbers or rovers, and thieves," to what extent are the insurers liable?

They are liable for piracy and robbery, and plunder by force, by persons not belonging to the vessel, or by the mariners belonging to it, where it could not have been prevented by reasonable vigilance and precautions. 3 Kent's Com. 303; 1 Phillips' Ins., § 1106.

24. When does the risk commence, and when does it terminate in marine insurance?

The commencement and end of the risk depend upon the words of the policy. If the insurance is made "at and from" a certain place, the risk begins as soon as the vessel is at that place, and continues while she is there, and also when she leaves that place. An insurance beginning "on" a certain day covers the whole of that day; if it begins "from" a certain day, the word "from" has the effect of "after," and the day is excluded. Insurance "from" a place begins only when a vessel casts off her moorings, or weighs her anchor and moves, with the intention of sailing. 2 Pars. on Cont. 364; 3 Kent's Com. 307.

25. If the policy be to a country generally, as to Cuba, where does the risk end?

In such case the risk ends at the first port made for the purpose of unloading, after the vessel has been moored there in safety for twenty-four hours. If the vessel be ordered off or into quarantine before the twenty-four hours have passed, the policy does not cease to attach; but if she be safely moored, and continue safe through a storm or other peril, which begins either before or within the twenty-four hours, and is afterward lost through the same storm or peril, she is not lost within the policy. 3 Kent's Com. 308; 2 Pars. on Cont. 367.

26. Where the insurance is on goods, what is the general rule for determining when the policy attaches to them?

As a general rule, where the insurance is on goods, the

policy attaches when it would attach to the vessel carrying them, were she insured. 2 Pars. on Cont. 365.

27. If the vessel departs voluntarily, and without necessity, from the usual course of the voyage, what effect will it have upon the contract of insurance?

It will have the effect to discharge the insurer from all liability for losses occurring subsequent to such deviation ; for it is a variation of the risk, and the substitution of a new voyage. The meaning of the contract of insurance for the voyage is, that the voyage shall be performed with all safe, convenient and practicable expedition, and in the regular and customary track. 3 Kent's Com. 312 ; 2 Pars. on Cont. 410.

28. What is to be understood by a total loss within the meaning of the policy ?

A total loss may arise either by the total destruction of the thing insured, or, if it specifically remains, by such damage to it as renders it of little or no value. A loss is said to be total if the voyage be entirely lost or defeated, or not worth pursuing, and the projected adventure frustrated. 3 Kent's Com. 318.

29. What is meant by a constructive total loss ?

It is a constructive total loss if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner ; and, in such cases, the insured may abandon all his interest in the subject insured, and all his hopes of recovery, to the insurer, and call upon him to pay as for a total loss. The object of the provision is to enable the insured to be promptly reinstated in his capital. 3 Kent's Com. 318 ; 2 Pars. on Cont. 382, 383.

30. What constitutes a partial loss, within the meaning of the policy ?

Every loss is a partial loss which is less than a total loss, either actual or constructive. The phrase "particular average" is frequently used as the equivalent of partial loss. 2 Pars. on Cont. 393 ; 3 Kent's Com. 335.

31. What is meant by the rule "one-third off new for old," in marine insurance?

This rule owes its origin to American usage and law, and it means that the insurer shall pay for any partial loss on the ship two-thirds of the whole expense of making the repairs thoroughly and with new materials, and of course the owner pays or loses the remaining third. 2 Pars. on Cont. 393; 2 Phillips on Ins., § 1431.

32. Has the above rule any application to a partial loss on goods?

It has not; and where there is a partial loss of goods the insurer pays what the goods have lost from their original invoice value, so that he neither loses nor gains by a rising or a falling market. 2 Pars. on Cont. 395; 2 Phillips on Ins., § 1456.

33. If the vessel insured should not be seaworthy, will the policy attach?

It will not, because seaworthiness is a condition precedent; but the insured is not in general bound to prove that this condition was fulfilled until the insurers offer some proof of unseaworthiness. 2 Pars. on Cont. 408; 1 Phillips on Ins., § 696.

34. What does the implied warranty of the seaworthiness of an insured vessel include?

The insured is understood impliedly to warrant that the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, the sales and rigging, stores, equipment and outfit generally, are such as to render it in every respect fit for the proposed voyage or service. 1 Phillips on Ins., § 695; 2 Pars. on Cont. 406.

35. Does the warranty extend to defects of the vessel, unknown to the assured?

It does, even to those which could not have been known, no less than those known to him. 1 Phillips on Ins., § 697.

36. How may this implied obligation be modified?

As in the case of any other implied obligation, it may be modified, enlarged or superseded by express agreement. 1 Phillips on Ins., § 698.

37. What losses are contracts of fire insurance intended to indemnify against?

Such contracts are most frequently entered into for indemnity against loss by fire of dwelling houses, but they are also often intended to insure against loss by fire of ships in port, of warehouses and mercantile property stored in them, of personal chattels in stores or factories, of merchandise, furniture, books and plate, pictures, or live stock. 2 Pars. on Cont. 418; 2 Kent's Com. 370.

38. How are contracts of fire insurance made?

They are made by companies incorporated for that purpose, and these may be stock companies or mutual companies, or both. 2 Pars. on Cont. 418.

39. What security does each of these companies respectively offer for the payment of losses to the insured?

The stock company offers, as a security for the payment of losses, the whole amount of its stock and also the proceeds of its business. Mutual companies offer as security the amount of their premiums, or, in other words, the whole amount of all the notes given by the insured. 2 Pars. on Cont. 419.

40. When does the risk commence, in a contract of fire insurance?

The risk commences when the offer to insure has been accepted, and the applicant has complied with all the conditions imposed, although the policy has not been issued. 1 Wait's Law & Pr. 581; 2 Pars. on Cont. 420 c.

41. If a policy be issued upon statements contained in an application, which turn out to be false or erroneous, what effect will this have upon the contract?

Statements made in an application for insurance, where they are material to the risk or any part of it, will be con-

sidered in the nature of a warranty ; and, therefore, if they are untrue, the policy issued upon them will be entirely void, and the insurers will be discharged from all liability. 1 Wait's Law & Pr. 582 ; 2 Pars. on Cont. 423 ; 3 Kent's Com. 373.

42. *Where the policy describes the insured as engaged in a certain trade or business, and, for the purpose of carrying on his business, the insured keeps and uses extra hazardous articles, will the contract of insurance be thereby affected?*

It will not ; for, under such a policy, the insured is permitted by implication of law to keep and use all articles necessary for the customary carrying on of such trade or business, although such goods are classed as extra hazardous. 2 Pars. on Cont. 424 ; 1 Wait's Law & Pr. 580.

43. *Will alterations made in the insured property have the effect to discharge the insurers?*

As a general rule mere alterations, although important and extensive, do not of themselves discharge the insurers. But, if expressly prohibited, they would have this effect, because they would then be a breach of warranty ; and so, they would have this effect, although not expressly prohibited, if they materially increased the risk. 2 Pars. on Cont. 428.

44. *May a party to an insurance contract make proper or necessary repairs to the insured property without affecting his policy?*

He may, in the absence of any stipulation to the contrary ; for every insurer against fire takes the risk incident to making necessary repairs to the insured property. It is safest, however, when important repairs are contemplated, to give notice to the insurance company of such intention. 1 Wait's Law & Pr. 581 ; 2 Pars. on Cont. 429.

45. *What effect will concealment or a suppression of the truth have upon a policy of insurance?*

It will have the same effect as an expression of what is false, that is, it will render the policy void. The insured is bound to state all that he knows himself, and all that it

imports the insurer to know, in order that the latter may accurately estimate the risk he assumes. 2 Pars. on Cont. 435.

46. What is meant by an insurable interest?

Any interest which would be recognized by a court of law or equity is an insurable interest; but this does not include a mere expectancy or probable interest, however well grounded it may be. Thus, one who has orally agreed to purchase a building cannot insure that building; but if the agreement could be enforced in equity, either because it was in writing, or by reason of part performance, the purchaser would then have an insurable interest. 2 Pars. on Cont. 438; 3 Kent's Com. 371.

47. Suppose that one man erects a house upon the land of another with the owner's consent, does he have an insurable interest in the house he thus erects?

He has; but the rule is otherwise if he erects a house without license or shadow of title. 2 Pars. on Cont. 438 k.

48. Does the mortgagor have an insurable interest in his mortgaged property?

He has; and this interest is not divested by the possession of the mortgagee, nor by the seizure of his property or even by its sale on execution, provided he still retains the power of redeeming it. In case of loss the insurers are responsible for the whole value of the property insured, to the extent of their insurance. 2 Pars. on Cont. 439; 1 Wait's Law & Pr. 580.

49. Has a mortgagee also an insurable interest in the mortgaged property?

He has; and a mortgagor and mortgagee may severally insure the same property, each calling it his own property, and neither specifying his interest. 2 Pars. on Cont. 439; 3 Kent's Com. 371.

50. Has a sheriff or a constable an insurable interest in personal property taken by virtue of an attachment or other legal process?

He has, because he has a special property therein, which is sufficient to give an insurable interest. And so a deputy

sheriff, as such, is authorized, without a special power for that purpose, to insure such property in the name and on behalf of his principal. 1 Wait's Law & Pr. 581 ; 1 Pars. on Cont. 443.

51. *If, at the time of the insurance, the insured property is exposed to a near and dangerous fire, will the policy attach?*

In such case the policy fails to attach, and for this reason: that the contract of insurance is founded on the assumption that when the policy attaches, the property is not exposed to an extraordinary peril. 2 Pars. on Cont. 444.

52. *If a house should be destroyed by lightning, but without ignition, would the insurers against fire be liable under a fire insurance policy?*

They would not, because fire policies insure against nothing but fire ; and although a house is frequently burned by being struck by lightning, yet lightning is not fire, and where it injures, but without ignition, the insurers against fire will not be liable. 2 Pars. on Cont. 446.

53. *Are insurers against fire liable on a policy for a loss caused by the explosion of gunpowder?*

They are, and the same rule would be applicable if the explosion were caused by the burning of saltpetre or any other combustible substance. On the other hand, the explosion of a steam boiler is not a loss by fire. The reason of the distinction is, that gunpowder explodes by combustion, and steam by expansion without combustion. 2 Pars. on Cont. 446.

54. *Are insurers against fire liable for injury caused by the water used to extinguish the fire, or for the loss caused by the blowing up of buildings to arrest the progress of a fire?*

They are ; for although the universal rule of contracts, *causa proxima non remota spectatur*, applies also to insurance against fire, yet both law and usage give a very liberal construction to it in favor of the assured under fire policies. Thus, where a house already on fire was blown up by gunpowder, and the policy provided that the insurers should not be liable for a loss from the explosion of gunpowder, they

were nevertheless held liable, because this clause was construed to mean, "fire originating from an explosion of gunpowder." 2 Pars. on Cont. 448; *Greenwald v. Ins. Co.*, 7 Am. Law Reg. 282.

55. *Will negligence on the part of the insured, or persons employed by him, constitute any ground of defense in an action on a fire policy?*

The great majority of fires are caused by the negligence of somebody, and it is to guard against this very risk that fire policies are made; hence the simple fact of negligence on the part of the insured, or his servants, has never been held to constitute a defense. 2 Pars. on Cont. 449; 3 Kent's Com. 374, note.

56. *If, previous to a loss, the insured alienates the whole or a part of his interest in the property; has he a claim for any loss?*

Policies against fire are contracts only between the insured and the insurer, and do not pass to any other party without the consent of the insurers. Hence, if the insured alienates the whole of his interest in the property, he loses nothing by the fire, and can have no claim for any loss; but if he alienates only a part, his claim is in proportion to the interest he retains. 2 Pars. on Cont. 450; 3 Kent's Com. 375.

57. *Is the right of the insured to indemnity in case of a loss assignable?*

It is; and an assignee for value may enforce his claim against the insurers. A mere assignment or transfer of the premises after a loss does not of itself, however, transfer the right of indemnity for the previous loss, unless the contract shows this to have been the intention of the parties. 2 Pars. on Cont. 450; 1 Wait's Law & Pr. 586.

58. *Is it essential to the validity of a contract of insurance, that the person to be insured thereby should be named in the policy?*

It is not; and, in case of doubt, extrinsic evidence may be resorted to, to ascertain the meaning of the contract. And,

when thus ascertained, it will be held to apply to the interests intended to be covered by it; and they will be deemed to be comprehended within it who were in the minds of the parties when the contract was made. *Clinton v. Hope Ins. Co.*, 45 N. Y. (6 Hand) 455.

59. May agents, commission merchants or others, having the custody of, and being responsible for property, insure such property in their own names?

They may do so, and recover of the insurer not only a sum equal to their own interest in the property, by reason of any lien for advances or charges, but the full amount named in the policy, up to the value of the property. 1 Wait's Law & Pr. 581; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. (6 Hand) 606; 3 Kent's Com. 371.

60. Is a contract for insurance made by parol valid in this State?

Though there was at one time a doubt on this point, it is now well settled that a good agreement for insurance may be made by parol in this State. *Fish v. Cottenet*, 44 N. Y. (5 Hand) 538.

61. What is the rule of law as to the construction of a contract of policy, in case of ambiguity in the terms?

This contract, like any other agreement, is to be interpreted and enforced, with a view to substantial justice. If there is a discrepancy or a repugnancy between the written and the printed portion of the policy, the written portion will prevail over the printed part; and, like other contracts, it is to be construed so as to give it effect rather than make it void. 1 Wait's Law & Pr. 580.

62. Where the policy requires that the insured shall give notice to the insurer of any subsequent insurance upon the same property, what will be the effect of a non-compliance with the condition?

The effect in such case will be to render the policy void from the time of making such subsequent insurance; and actual notice of such subsequent insurance to an ordinary

insurance agent of the insurer will not be a sufficient compliance with the condition. 1 Wait's Law & Pr. 586; 2 Pars. on Cont. 457.

63. *If the application for insurance should be drawn, and the measurements and survey be made by a duly authorized agent of the insurers, and the applicant for insurance should do nothing but sign such application, without even examining its correctness, would he be bound by the statements therein contained?*

He would not; and the insurers would be estopped from controverting the truth of such statements. 1 Wait's Law & Pr. 584.

64. *Suppose the applicant employs an agent of the insurer to draw up his application for insurance, will the applicant be bound by the erroneous statements inserted by such agent in the application?*

He will, even though the erroneous statements are inserted without the knowledge of the applicant. 1 Wait's Law & Pr. 584.

65. *May a person act in the capacity of agent for both parties to an insurance contract?*

He may not, and a contract of insurance, so made, may be set aside by either party. *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. (4 Kern.) 85.

66. *On what principle are losses by fire adjusted?*

They are adjusted on the principle of a particular average, and the estimated loss is paid without abandonment of what has been saved. The insurers pay the whole amount lost by the fire, with no other limitation than that it shall not exceed the amount which they insure. 3 Kent's Com. 375; 2 Pars. on Cont. 462.

67. *What is the nature of the contract of life insurance?*

The purpose of this contract is to provide a fund for creditors, or for family connections in case of death, and it is made by a policy similar in many respects to other policies. The

insurer, in consideration of a sum in gross, or of periodical payments, undertakes to pay a certain sum, or an annuity, depending upon the death of the person whose life is insured. The insurance is either for the whole term of life or for a limited period. 3 Kent's Com. 363 ; 2 Pars. on Cont. 464.

68. How is the application for life insurance made?

Application is made as in fire policies, by a written document, in which many questions are put, all of which must be answered. These answers are in general made so far a part of the contract as to be, in law, warranties; but they may be made, according to the form of the answer, warranties of fact or warranties of the belief of the answer. 2 Pars. on Cont. 465 ; 3 Kent's Com. 370.

69. Are these questions and answers strictly or liberally construed by courts and juries, as regards the insured?

Courts and juries usually construe these questions and answers quite liberally in favor of the answerer, and strictly against the insurers, unless it be a case in which there is a reasonable suspicion of fraud. This construction is adopted for the reason that the insurers frame the questions as they please, so as to embrace all the possibilities which could affect the risk; including some which it might be thought would affect it very remotely. 2 Pars. on Cont. 465.

70. What effect does the want of good faith in the answers or the concealment or suppression of material facts have upon a life insurance policy?

It will have the effect of rendering it void, for the same good faith is as requisite in this as in all other policies; and whether the suppression arises from fraud or accident is quite immaterial, if the fact be material to the risk, and this is a question for a jury. 3 Kent's Com. 369 ; 2 Pars. on Cont. 465.

71. In a warranty, that the person whose life is insured is in good health, what degree of health is required, in order to make the policy attach?

In such warranty, by good health must be understood that which would ordinarily and reasonably be regarded as

good health. It does not mean perfect and absolute health, for the seeds of death are in every human constitution, and it is only requisite that there be not, at the time, any existing disorder tending to shorten life. 3 Kent's Com. 370 ; 2 Pars. on Cont. 466.

72. Does the warranty of good health have application to the mind as well as the body ?

It does ; and if insanity be known and concealed the policy will be avoided. 2 Pars. on Cont. 466.

73. Suppose that material facts are misrepresented, but honestly, and in mere ignorance, and the insurers knew the truth, is the policy thereby avoided ?

It is not, nor is it avoided by such misstatement of a fact, which, if truly stated, would not diminish the risk ; for then, if the insurers are deceived, it is to their own advantage. Neither will a policy be avoided by a mere misrepresentation relating to a fact concerning which there is an express warranty. 2 Pars. on Cont. 472.

74. What is the general rule as to the construction of restrictions or limitations as to place, imposed upon the insured by the terms of a life policy ?

The language employed in expressing these limitations will be liberally construed ; but positive departure from a precisely stated limitation has been held to avoid the policy, although an exact compliance with it was impossible, and the departure from it rather lessened than increased the risk. 2 Pars. on Cont. 473.

75. Would the death of the insured by the hands of justice avoid a life policy ?

It has been held that the life insurance in such case would be avoided upon the general policy of the law even without the insertion of such an exception in the policy ; but this exception is now made in nearly all policies, and it is also usual to insert exceptions as to war risks, suicide, or death in a duel. 3 Kent's Com. 369 ; 2 Pars. on Cont. 475.

76. Will an exception in a policy, as to suicide, discharge the insurers from liability where death is self-inflicted in a paroxysm of insanity?

If the exception expressly included suicide under insanity the policy in such case would doubtless be avoided ; but in the absence of an exception including suicide under insanity, and applying the general principles of insurance to the construction of the policy it would hardly be sufficient to render it void, that death was self-inflicted, if without the concurrence or action of a responsible mind or will. 3 Kent's Com. 369, note 6 ; 2 Pars. on Cont. 476.

77. What interest is insurable in life insurance contracts ?

In this contract, as in other policies, any legal or equitable interest may be insured ; but it is a general rule that the party insuring must have an interest in the life insured, and wherever there is a positive and real dependence of one person upon another, the person so dependent has an insurable interest in the life of the other. Each person has an insurable interest in his own life ; a wife in the life of her husband ; a person in the life of his partner ; a creditor in his debtor's life, or a father in the life of his minor child. 3 Kent's Com. 366 ; 2 Pars. on Cont. 479.

78. Are life policies assignable ?

They are, and are frequently made for the purpose of assignment, in order that the insured may thereby be enabled to give security to his creditors ; and on the death of the insured the assignee recovers the whole amount insured, and not merely the consideration for the assignment. 3 Kent's Com. 368 ; 2 Pars. on Cont. 481.

79. How are such assignments usually made ?

They are usually made in accordance with certain rules and provisions respecting assignment contained in the policies, which are binding on the parties to the contract ; but a mere delivery and deposit of the policy for the purpose of an assignment would operate as such without any writing. 2 Pars. on Cont. 482 ; 3 Kent's Com. 368, note 3.

80. Will the law protect an assignee against acts of the insured which would have discharged the insurers had the policy remained in the hands of the insured?

If the policy contains an express provision to that effect, the assignee will be protected ; but, in the absence of such provision, it has been held that, whatever would be a forfeiture of the policy if it remained in the hands of the insured, would operate equally after the assignment. 2 Pars. on Cont. 482.

81. At what time does a life insurance policy attach or terminate ?

All life policies are of course terminated by the death of the insured ; but the burden of proof is necessarily upon the representatives of the insured, to show that the death occurred within the policy. There is a presumption of death if a party has been absent seven years without having been heard from, but there is no legal presumption as to the time of his death. 3 Kent's Com. 370 ; 2 Pars. on Cont. 484.

82. Suppose the insurers have a certain usage as regards the proof of death, what is necessary in order that such usage may be binding ?

It is necessary that the usage was known to the insured, and by-laws respecting it can have no effect unless they form a part of the policy ; and, although a policy requires such proof of death as the insurers may demand, reasonable proof only can be required. 3 Kent's Com. 370, note 1 ; 2 Pars. on Cont. 485.

83. How are payments on premiums usually made in life insurance policies ?

If the insurance be for a year or less, the premium is usually paid in money, or by a note at once. If for more than a year, it is usually payable annually ; and it is common to permit the annual payment to be made quarterly, with interest from the day when the annual premium became due. Unpaid premiums in any case, whether notes had been given or not, would be deducted from a loss. 2 Pars. on Cont. 486.

84. *If the policy provides that the risk shall terminate in case the premium charged shall not be paid in advance on or before the day at noon on which the same shall become due and payable, and the day of payment falls on Sunday, when is the premium payable?*

In this case the premium is not payable until Monday, even though the assured should die on Sunday afternoon. 2 Pars. on Cont. 487.

85. *What effect will negligence in the payment of a premium when due have upon the policy?*

In many cases such negligence would avoid the policy; hence the utmost care is always requisite on the part of the insured to pay his premium when it is due. Sometimes insurers accept and treat as a regular payment a premium offered to them a few days after it fell due, if they are satisfied that no change in the risk has occurred in the mean time, but this they are not bound to do. It is always an indulgence, and ought not to be acted on as a probability, because it is never a right. 2 Pars. on Cont. 488.

CHAPTER XIV.

WILLS.

1. What is a will?

A will is the legal declaration of a man's intentions, which he directs to be performed after his death. Wills are technically divided into *devises* and *testaments*. A devise is applied to the disposal of real estate; a testament to the disposal of personal estate; but, in common parlance, a testamentary disposition of either real or personal property, or of both, is denominated a "last will and testament." 2 Bl. Com. 499, 500; Willard on Ex. & Surr. 56; 4 Kent's Com. 501.

2. What is a codicil?

A codicil is a supplement to a will, or an addition made by the testator, and annexed thereto, and to be taken as a

part of a testament, being for its explanation, or alteration, or to make some additions to, or subtraction from, the former disposition of the testator. 2 Bl. Com. 500; Willard on Ex. & Surr. 58; 4 Kent's Com. 531.

3. What is an unwritten will called, and when are such wills valid?

Unwritten wills are known in law as *nuncupative* wills; and such wills are valid only when made by a soldier while in actual military service, or by a mariner while at sea. Willard on Ex. & Surr. 64; 4 Kent's Com. 517.

4. At what age may a will of real or personal estate be made?

No person in this State can make a valid will as to real estate who is under the age of twenty-one years; but males at eighteen, and females at sixteen, years of age may make a valid will as to personal estate. Willard on Ex. & Surr. 67; 4 Kent's Com. 506.

5. State generally who may dispose of real estate by will?

Any person of sound mind may dispose of real estate by will, with the exception of married women and infants; and even the disability arising from coverture has been so far removed as to exist in name rather than in fact. Willard on Ex. & Surr. 65, 94; 4 Kent's Com. 505; Willard on Real Estate, 472, 474.

6. In what respect does the law discriminate between the testamentary capacity requisite to make a valid will of real estate and a valid will of personal property?

Only in respect to the age of the party making such wills. Willard on Ex. & Surr. 65; Willard on Real Estate, 481.

7. What degree of unsoundness of mind will render a person totally incapable of making a will?

Only that total want of understanding which is denominated idiocy. Mere imbecility of mind in the testator is insufficient to have this effect. Willard on Ex. & Surr. 68.

8. Can a person who is deaf, dumb or blind make a valid will?

He can, if he has the power of communicating with others, and is not otherwise under a disability. Willard on Ex. & Surr. 69.

9. What provision is made by statute in respect to the mode of subscribing wills of persons who cannot write their own names?

The Revised Statutes provide that where a person cannot write his own name, and his signature is subscribed by another person, that person must also write his name to the will as a witness, under the penalty of \$50 ; but that his omission to do so will not invalidate the will. This provision of the statute gives an implied authority to a party to make a will who is unable to subscribe his own name, notwithstanding the requirement of statute that the will shall be subscribed *by the testator* at the end of the will. Willard on Ex. & Surr. 71, 100 ; Willard on Real Estate, 484.

10. Is a will made by a lunatic during a lucid interval valid?

Yes. Willard on Ex. & Surr. 75.

11. What is the presumption of law as to the sanity of a testator at the time of making his will?

The law presumes the testator sane until the contrary appears, and the burden of proof, as to his mental capacity, lies on the party alleging insanity ; but when the fact of habitual derangement is once established, it lies upon those claiming under the will to prove that, at the time of its making, the testator had a lucid interval and was restored to reason. Willard on Ex. & Surr. 74.

12. Will the fact that a testator is a monomaniac, or insane on one subject only, be sufficient to invalidate a will made by him?

It will, if the testamentary act can be traced to, and is the result of, some morbid delusion which constitutes such partial insanity, even if, at the time of making the will, the testator

was sane in other respects upon ordinary subjects. Willard on Ex. & Surr. 80.

13. Can a habitual drunkard, or a person under the influence of intoxicating liquors, make a valid will?

A habitual drunkard, while subject to a commission, if of sufficient mental capacity, may make a valid will. The existence of the commission is only *prima facie* evidence of incapacity, and may be rebutted by proof. Neither habitual intoxication, nor the actual stimulus of intoxicating liquors at the time of executing a will, incapacitates the testator, unless the excitement be such as to disorder his faculties and pervert his judgment. *Lewis v. Jones*, 50 Barb. 645; *Peck v. Cary*, 27 N. Y. (13 Smith) 9. See Willard on Ex. & Surr. 88.

14. Will extreme old age of itself render a person incapable of making a valid will?

It will not. The law looks only to the competency of the understanding, and not to age or bodily infirmities. Willard on Ex. & Surr. 85.

15. When is a person, within the intent and meaning of the statute of wills, of sound mind and memory, and competent to devise by will?

When he has sufficient capacity to comprehend perfectly, 1. The condition of his property; 2. His relations to the persons who are or should be the objects of his bounty; and 3. The scope and bearing of the provisions of his will; 4. He must have memory sufficient to enable him to collect in his mind, without prompting, the particulars of the business to be transacted, and to hold them there long enough to perceive their relation to each other, and be able to form some rational judgment in relation to them. *Von Guysling v. Van Kuren*, 35 N. Y. (8 Tiff.) 70; *Watson v. Donnelly*, 28 Barb. 653.

16. When may and when may not the will itself be considered, for the purpose of determining the mental capacity of the testator?

When the will of a lunatic has been drawn by himself, without assistance, the manner in which it is drawn and the

disposition made of the testator's estate may be considered in determining the fact of a lucid interval at the time of its execution, and so far becomes evidence of the capacity of the testator. But if the testator is neither an idiot nor a lunatic, the only question is, had he the capacity to make a will, not had he capacity to make the will produced. If the testator was *compos mentis*, he could make any will, however complicated; but if *non compos mentis*, he could make no will, however simple. Willard on Ex. & Surr. 79; *Delafield v. Parish*, 25 N. Y. (11 Smith) 9.

17. *What is the rule as to the validity of wills executed under duress?*

A will so executed is absolutely void. Willard on Ex. & Surr. 89.

18. *What degree of fraud, in obtaining the execution of a will, will render it void?*

Any undue advantage taken of the testator, by which he is induced to make a will which he otherwise would not have made, vitiates the will. Willard on Ex. & Surr. 90.

19. *What degree of importunity will vitiate a will?*

It must be a degree of importunity that the testator was too weak to resist, and which so far destroyed his free agency as to render the execution of the will no longer his act. Willard on Ex. & Surr. 91.

20. *If a person, by continued acts of kindness and affection, acquires such an influence over another that the latter voluntarily, or at the mere request of the former, wills him all his property, to the exclusion of all other persons who might reasonably expect to have been made legatees, will this influence be such as to invalidate the will?*

It will not. Influence arising from attachment and affection is not that *undue* influence which will invalidate a will; neither is the mere desire to gratify the expressed wishes of another evidence of such influence or of importunity. The influence necessary to invalidate a will must be such as arises from threats, force or coercion, destroying free agency, and

the favors received under the will must have been obtained by such coercion, or by importunity that could not be resisted, and which produced compliance for the sake of peace. Willard on Ex. & Surr. 92.

21. What power was conferred upon married woman by the act of 1849, in respect to the disposal of her property by will?

The act of 1849 removed the disability that attended married women at common law and under the Revised Statutes, in respect to the power of disposing of her property by will, by enacting that any married female might take by inheritance, or by gift, grant, devise or bequest from any person other than her husband, and hold to her separate use, and convey and devise real and personal property in the same manner and with like effect as if she were unmarried. Willard on Ex. & Surr. 94.

22. What is a holograph?

A holograph is a testament written wholly by the testator. Willard on Ex. & Surr. 70.

23. What are the four statutory requisites to the valid execution of a will?

1. That it be subscribed by the testator at the end of the will ; 2. That such subscription be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses ; 3. That the testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament ; and, 4. That there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator. Willard on Ex. & Surr. 98 ; Willard on Real Estate, 482.

24. Is it necessary to the validity of a will that the testator should sign the will with his own hand, or may it be subscribed by another at his request?

If a will is subscribed by another at the request of the testator, it will be a sufficient compliance with the statute, if

from any reason the testator is unable to write his own name. *Robins v. Coryell*, 27 Barb. 556; Willard on Ex. & Surr. 100; Willard on Real Estate, 484.

25. Does the statute imperatively require that the subscription of the testator shall be made in the presence of each attesting witness?

It does not. It is a sufficient compliance with the statute if the testator shall acknowledge to each witness that the subscription was made by him. Nor is it necessary that the testator shall exhibit his subscription to the will at the time of making the acknowledgment of the execution. *Willis v. Mott*, 36 N. Y. (9 Tiff.) 486; S. C., 2 Trans. App. 61.

26. What do you understand by the "publication" of a will?

Publication is the declaration by the testator in the presence of the attesting witnesses that the instrument subscribed by him is his last will and testament. It is an act independent of the acknowledgment by the testator that the subscription to the will is his signature. *Baskin v. Baskin*, 36 N. Y. (9 Tiff.) 416; Willard on Ex. & Surr. 100, 102; Willard on Real Estate, 486.

27. Is it necessary that the publication of a will should be in any set form of words, in order to render the execution valid?

It is not. Unlimited latitude of expression is allowed in the publication of a will, if it conveys the proper meaning. The expression may be made orally, in writing, or by signs, provided the general sense and design of the statute is complied with. But the witnesses must both understand, from some unequivocal act or saying of the testator to them, that the instrument is his will. *Hunn v. Case*, 5 N. Y. Surr. (1 Redf.) 307; *Van Hooser v. Van Hooser*, id. 365; Willard on Ex. & Surr. 103.

28. What will be the effect of an omission, on the part of the subscribing witnesses, to write opposite to their names their respective places of residence as required by statute?

It will have no effect on the validity of the attestation, but

will subject the witnesses to a penalty of \$50. Willard on Ex. & Surr. 104 ; Willard on Real Estate, 488.

29. Is it necessary to the due attestation of a will that the witnesses should subscribe it in the presence of each other?

It is not. It is sufficient that each witness subscribe at the request of the testator, and in his presence, although severally and apart from each other. *Hoysradt v. Kingman*, 22 N. Y. (8 Smith) 372 ; Willard on Real Estate, 489.

30. In case a witness cannot write his own name, how may a will be attested by him?

He may make his mark, and this will be a sufficient signing of his name within the statute relating to the execution of wills. *Morris v. Kniffin*, 37 Barb. 336 ; Willard on Ex. & Surr. 105 ; Willard on Real Estate, 489.

31. What is essential as to the form of the request of the testator that the witnesses sign the will?

It is only essential that the testator shall, by any act or words, clearly evince a desire that the witnesses shall sign the will as witnesses. *Coffin v. Coffin*, 23 N. Y. (9 Smith) 9 ; Willard on Ex. & Surr. 106 ; Willard on Real Estate, 490.

32. State the substance of the attestation clause usually inserted in a will.

The attestation clause is a formal statement signed by the witnesses, to the effect that the testator subscribed his name to the instrument in their presence, and at the same time declared in their presence that the same was his last will and testament, and requested each of them to sign their names thereto as witnesses to its execution, and that they have so done in the presence of the testator, and of each other upon the day of the date of the will. Willard on Ex. & Surr. 108, 474.

33. What advantages arise from the introduction of an attestation clause in a will?

In case of the death of the witnesses, or their failure of memory, the clause will furnish presumptive evidence that all the requisite formalities were complied with ; and it will also

show that the person who drew the will knew what formalities were requisite to its valid execution, and will tend to raise the presumption that he gave to the testator the necessary information in respect thereto. Willard on Ex. & Surr. 108, 109. See *Peck v. Cary*, 27 N. Y. (13 Smith) 9; 25 How. 590; *Hunn v. Case*, 1 Redf. 307.

34. Can a person named as a devisee or legatee in a will be a competent witness of its execution?

He can, and can be compelled to testify respecting the execution of the will in the same manner as if he had not been so named therein. Willard on Ex. & Surr. 110.

35. What will be the effect of the attestation of a will by a witness named therein as a legatee?

If the will cannot be proved without the testimony of such witness it will be void so far only as concerns such witness or those claiming under him. But the witness will be still entitled to receive so much of the testator's estate (but not to exceed the value of the legacy) as would have descended to him in case the will was not established. Willard on Ex. & Surr. 110. But if the will can be proved without the testimony of such witness, the legacy will not be void even though the legatee be examined as a witness. *Cornwall v. Wesley*, 3 Keyes, 378.

36. Does the rule of the Code, that "no person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto," apply to proceedings in surrogates' courts?

It does not. All questions of evidence in such courts are decided by the principles of the common law so far as they are not altered by the Revised Statutes. Willard on Ex. & Surr. 110; Wait's Code, 21, § 8.

37. Is it necessary to the validity of a will that it should be drawn up in any set form of words?

It is not. Willard on Ex. & Surr. 112.

38. Is it material in what language the will is written?

It is not. Willard on Ex. & Surr. 113; Willard on Real Estate, 483.

39. What materials should be used in writing a will?

A will should be written on paper or parchment with pen and ink. Willard on Ex. & Surr. 113; Willard on Real Estate, 483.

40. What will be the effect of pencil interlineations in a will?

If made before its execution they will be a part of the will: if made afterward they will not affect its validity. *Matter of Tonnelle*, 5 N. Y. Leg. Obs. 254; S. C. affirmed, 4 N. Y. (4 Comst.) 140.

41. Who are the proper parties to draw the will?

Any person possessing the requisite intelligence may draw a will; but where the person drawing the will takes a benefit under it, the court will view the transaction with suspicion and will not pronounce in favor of the will until that suspicion is removed by evidence that the will was the spontaneous intention of the testator. Willard on Ex. & Surr. 114.

42. How must a codicil be executed in order to be valid?

In the same manner as a will. The term "will," as used in the statutes, includes codicils as well as wills. Willard on Ex. & Surr. 117.

43. How may a will be revoked?

1. By a subsequent written will; 2. By a formal written revocation; 3. By canceling or destroying the will; 4. By change in the testator's circumstances or relations, as by subsequent marriage and birth of a child. Willard on Ex. & Surr. 118; Willard on Real Estate, 482.

44. What is meant by the rule that no man can die with two testaments?

The rule is intended to express the legal principle that no two instruments, intended as wills, executed by the same per-

son and inconsistent with each other, can have a legal existence at the same time ; as the one last executed only will be deemed the will of the testator. But the rule does not deny a legal existence to any number of instruments properly executed, though at different times, as parts of, and collectively constituting the last will of the deceased. The rule applies only when a subsequent will expressly revokes a prior one, or when the two are so inconsistent with each other as to be incapable of standing together. Willard on Ex. & Surr. 119.

45. *State the rule as to the effect of a subsequent will on a prior will, where the will last executed does not expressly revoke the prior one?*

If a subsequent testamentary paper is inconsistent with one of earlier date in part only, the former instrument will be revoked by the latter in such parts only ; but when the subsequent paper is not in conflict with the prior will, but makes a full disposition of the estate, whether wholly or partially incompatible with a former will, it is a revocation of such prior will *in toto*, unless it appear from the instrument itself that it was the intention of the testator that they should stand together. Willard on Ex. & Surr. 119.

46. *If A, by his will, devises a certain piece of land to B, and in the same instrument devises the same land to C, who will take the land so devised?*

C A and B may both take the estate as joint tenants or as tenants in common. *Barlow v. Coffin*, 24 How. 54.

47. *If A, in one instrument, devises land to B, and in another and later one devises the same land to C, who will take the land so devised?*

C, as the will last executed will revoke the former one. *Barlow v. Coffin*, 24 How. 54.

48. *A, having made his will, made another and later will, revoking the first, and subsequently destroyed the second will. Did the destruction of the second will operate to revive the first?*

Not unless it appears by the terms of the revocation that

it was his intention to revive and give effect to the first will. 4. Kent's Com. 532, 533; Willard on Ex. & Surr. 120.

49. What formalities are necessary to render an express revocation of a former will valid?

The will, codicil or other writing declaring such revocation must be executed by the testator with the same formalities that are required by the law for the execution of a will. Willard on Ex. & Surr. 122; *Delafield v. Parish*, 1 Redf. 1; S. C. affirmed, 25 N. Y (11 Smith) 9; Willard on Real Estate, 492.

50. What three things must concur to render the burning, tearing, canceling, obliterating or destroying of a will by the testator, a revocation?

1. The testator must at the time possess a testamentary capacity; 2. The act must have been done with the intention of revoking the will; 3. The act by which that intention is carried into effect must, in the judgment of the law, have been completed. Willard on Ex. & Surr. 123-125; Willard on Real Estate, 493.

51. What further requirement is imposed by statute where the act of destroying, canceling or burning is done by another person by the direction and consent of the testator?

In order that the act shall amount to a revocation, the statute requires that the fact of the destruction, and the direction and consent of the testator shall be proved by at least two witnesses. Willard on Ex. & Surr. 124.

52. When may a lost or destroyed will be proved in the supreme court?

1. When the will is proved to have been in existence at the time of the death of the testator; or 2. When it has been shown to have been fraudulently destroyed in the life-time of the testator; and 3. When its provisions can be clearly and distinctly proved by two credible witnesses, or by a copy of the will and one witness. Willard on Ex. & Surr. 125.

53. *If a will is destroyed in the presence and at the request of the testator, but without the presence of other witnesses, can such destruction be deemed fraudulent, and can the will be established as a lost or destroyed will in the supreme court?*

It cannot. The fraud in the destruction of a will must consist in some deceitful contrivance, device or practice, to defeat the wishes and intent of the testator in regard to his will. *Timon v. Claffy*, 45 Barb. 348; S. C. affirmed, 41 N. Y. (2 Hand) 619.

54. *If it is proved that a will was once executed, but that it cannot be found, will the law presume its continued existence, or its destruction by the testator, *animo revocandi*?*

If the will remained after its execution in the custody or control of the testator, the law will presume that it was destroyed by him with the intent of revoking it. Willard on Ex. & Surr. 126. See *Schultz v. Schultz*, 35 N. Y. (8 Tiff.) 653.

55. *What will be the effect of marriage on a will executed by an unmarried female?*

The marriage will operate as a revocation of a will executed prior to such marriage. Willard on Ex. & Surr. 128; 4 Kent's Com. 527; Willard on Real Estate, 494.

56. *A, being unmarried, made his will, leaving his entire estate to his nephew; afterward A married, and died leaving a son surviving him, for whom no provision had been made by marriage settlement or otherwise: will the estate go to the nephew, according to the terms of the will?*

It will not. The marriage, together with the birth of issue of such marriage, will operate as a revocation of the will. Willard on Ex. & Surr. 128; 4 Kent's Com. 527; Willard on Real Estate, 494.

57. *What provision is made by statute in favor of post testamentary children unprovided for by will or otherwise?*

Every post testamentary child succeeds to the same portion of the father's real and personal estate as would have descended to him if the father had died intestate, and is entitled to recover the same portion from the devisees and

legatees, in proportion to and out of the parts devised and bequeathed to them by the will of the testator. Willard on Ex. & Surr. 129 ; Willard on Real Estate, 497 ; 4 Kent's Com. 525, 526.

58. What will be the effect upon his will if A, during his life-time, alienate lands which he had previously devised to B?

The alienation of this property by A will operate as a revocation *pro tanto* of his will. Willard on Ex. & Surr. 130 ; Willard on Real Estate, 496 ; 4 Kent's Com. 528.

59. If a testator enters into a valid agreement or covenant to convey lands, which equity will enforce specifically, will such agreement or covenant be deemed in law or equity a revocation of a prior devise of the same property?

It would have been so held in equity prior to the Revised Statutes. But the Revised Statutes declare that such agreement or covenant shall not be deemed a revocation either at law or in equity, but that the property shall pass by the devise, subject to the same remedies, on the agreement or covenant for a specific performance or otherwise against the devisees as might be had against the heirs of the testator or the next of kin, if the same had descended to them. Willard on Ex. & Surr. 130, 131 ; Willard on Real Estate, 495 ; 4 Kent's Com. 528, 529.

60. If a testator, by conveyance, settlement, deed or other act, alters, but does not wholly divest himself of his estate or interest in property previously devised or bequeathed, will this alteration operate as a revocation of his will?

It would have so operated before the Revised Statutes, but under the Revised Statutes the alteration will not operate as a revocation of the devise or bequest; but the devise or bequest passes to the devisee or legatee the actual estate or interest of the testator which would otherwise descend to his heirs or pass to his next of kin, unless the instrument by which such alteration is made declares an intention to revoke such previous devise or bequest. If, however, the provisions of the instrument making such alteration are wholly inconsis-

ent with the terms or nature of the previous devise or bequest, the instrument operates as a revocation, unless its provisions depend on a condition which has failed. 4 Kent's Com. 532, 533; Willard on Ex. & Surr. 131; Willard on Real Estate, 496.

61. *If a testator sells and conveys lands previously devised, and takes back a bond and mortgage for the whole or a part of the consideration money, will the sale revoke the will as to the land so sold and conveyed?*

It will. Willard on Ex. & Surr. 132; Willard on Real Estate, 496.

62. *If land be devised by A to B, and be afterward conveyed by deed to B, will B hold the land under the deed or under the will, upon the death of A?*

He will hold it by deed, and not by will. Willard on Real Estate, 496.

63. *How may a will be republished?*

It can be republished by repeating the ceremony by which it was executed, or by a duly attested codicil. Willard on Ex. & Surr. 133; Willard on Real Estate, 499.

64. *If a codicil, properly attested, refers to a will not duly attested, will the execution of the codicil cure the defect in the execution of the will?*

It will, even where it is unattached to the will, and although the witnesses attesting the codicil did not see the will to which it referred. Willard on Ex. & Surr. 133; Willard on Real Estate, 499.

65. *What is the first thing to determine in the construction of a will?*

The intention of the testator, as collected from the will itself. When not inconsistent with the rules of law, this intention will control. Willard on Ex. & Surr. 369; Willard on Real Estate, 504; 4 Kent's Com. 534.

66. What is the general rule for the construction of the language of a will?

It should be construed according to its primary and ordinary meaning, where the will shows no intention on the part of the testator to give it a different signification. Technical words should be construed as used in their technical signification, unless, by so doing, the intention of the testator, as gathered from the whole will, would be overthrown instead of supported, in which case they are to be construed as used in their ordinary and popular sense. Willard on Real Estate, 504; Willard on Ex. & Surr. 369.

67. How must a will and codicil be construed?

A will and codicil should be taken and construed together as parts of one and the same instrument. Willard on Ex. & Surr. 370; Willard on Real Estate, 504.

68. If two parts or provisions of a will are repugnant, so that both cannot stand, which must prevail?

The last, unless other parts of the will forbid such a construction. Willard on Ex. & Surr. 369; Willard on Real Estate, 505.

69. What property passes by a devise of a testator's "estate?"

The devise passes both real and personal property; and wherever the word "estate" is used in a devise of lands, without any words of limitation, the fee passes to the devisee. Willard on Real Estate, 506; Willard on Ex. & Surr. 370; 4 Kent's Com. 535.

70. When the word "goods" is used without restriction in a bequest, how should it be construed?

It should be construed as including all the personal estate of the testator. Willard on Ex. & Surr. 371.

71. If A wills his personal property to B, will B take all the personal property of which A was possessed at the time of executing the will, or such as A possessed at the time of his death?

He will take all the personal property of which A died

possessed, as a will of personal property speaks from the death of the testator. Willard on Ex. & Surr. 373.

72. *What is the appropriate expression for a devise in fee simple?*

"I give and devise to A, his heirs and assigns forever." Willard on Real Estate, 508.

73. *If A devises lands to the "heirs" of B, and B be still living at the death of A, why will the devise be void?*

For the reason that B, being still living, can have no heirs, as *nemo est hæres viventis*. Reeves' Dom. Rel. 626 (486); Willard on Real Estate, 512, 513.

74. *When will a devise or bequest be void from uncertainty?*

Whenever it is impossible to discover from the whole will the intention of the testator. Conjecture is not allowed to enter into the construction of wills. Willard on Real Estate, 514.

75. *If a testator devises land to certain individuals under fictitious names, and states in the body of the will that the true names of the devisees are to be found written opposite the fictitious names on a card placed in a certain place for safe-keeping, can the card be used in evidence to show what persons the testator intended should share his estate?*

It cannot. Willard on Real Estate, 516.

76. *If land is devised to John Smith, and it appears that there are several persons known by that name, can parol evidence be introduced to show what particular John Smith was intended in the devise?*

It can. Willard on Ex. & Surr. 377.

77. *If a testator devises lands to the children of his two daughters A and B, to be equally divided among them as they respectively arrive at the age of twenty-one years, what grandchildren, born after the execution of the will, will be included in it?*

All born before the death of the testator. Such as are

born after such death are excluded from the provisions of the will. *Doubleday v. Newton*, 27 Barb. 431.

78. Who are included in the word "issue" as used in a will?

Both children and grandchildren. Willard on Real Estate, 523.

79. Will a nick-name be sufficient to designate a devisee?

It will if it is a name given by the testator and current in his family. Willard on Real Estate, 511.

CHAPTER XV.

EXECUTORS AND ADMINISTRATORS.

1. What is the meaning of the term "executor?"

An executor is one who, by the terms of a will, is intrusted with its execution. 2 Bl. Com. 503.

2. Who may be appointed executor?

Any person may be appointed and act as executor, unless he is, (1) incapable in law of making a contract; or (2) under the age of twenty-one years; or (3) an alien not an inhabitant of this State; or (4) has been convicted of an infamous crime; or (5) shall be judged incompetent by the surrogate to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding. Willard on Ex. & Surr. 134.

3. What formality must be observed before a married woman can become an executrix?

A married woman may become an executrix on obtaining and filing with the surrogate the written consent of her husband. Willard on Ex. & Surr. 135; Reeves' Dom. Rel. 305.

4. If a person who is a professional gambler is designated in a will as the executor thereof, will the surrogate be justified in refusing to grant him letters testamentary?

He will. It has been decided by the court of appeals that

the fact that a man is a professional gambler is presumptive evidence of such improvidence as to render him incompetent to discharge the duties of executor or administrator. Willard on Ex. & Surr. 136.

5. *Will the bare fact that a person is illiterate, if otherwise competent, authorize the withholding from him of letters testamentary?*

It will not. Willard on Ex. & Surr. 137.

6. *If A is appointed sole executor of the last will and testament of B, and dies before the full execution of his trust, will his executor succeed to the office of his testator, and be entitled to proceed to settle the affairs of both A and B?*

He would at common law, but not under the Revised Statutes. When a sole executor, or a surviving executor of any last will and testament dies, the statute requires that the surrogate shall grant letters of administration *cum testamento annexo* of the assets of the first testator left unadministered. Willard on Ex. & Surr. 139.

7. *What is the effect of the death of one of several executors?*

Upon the death of one of several executors, the surviving executor or executors succeed to the duties of his office, and become vested with the interest of the original testator. Willard on Ex. & Surr. 140.

8. *What do you understand by the term "executor de son tort?"*

Executor de son tort is a term applied at common law to a person not appointed executor who intermeddles in that character with the goods of the deceased, and thereby makes himself *executor in his own wrong*, and, as such, liable to others without being himself armed with any legal rights. 2 Bl. Com. 507.

9. *What provision is made by statute in relation to the liability of a party who interferes with the property of a deceased person?*

The Revised Statutes enact that no person shall be liable to an action as executor of his own wrong by reason of having

received, taken or interfered with the property or effects of a deceased person, but that he shall be responsible as a wrong-doer in the proper action to the executors, or general or special administrators of such deceased person, for the value of the property taken or received, and for all damages caused by his acts to the estate of the deceased. Willard on Ex. & Surr. 140.

10. How may an executor, who has not taken the oath of office, be discharged from his trust?

He may free himself from the duties of the office by (1) a formal renunciation of the office, or (2) by refusing or neglecting to appear before the surrogate to take the oath of office. Willard on Ex. & Surr. 141, 142.

11. What do you understand by the term renunciation, and what formalities are necessary to render it effectual?

A written declination of the office of executor is termed a renunciation. It must be executed in the presence of two witnesses ; proved before the surrogate who took the proof of the will ; and be filed and recorded by him. Willard on Ex. & Surr. 141.

12. What power may an executor exercise before a will has been admitted to probate and letters of administration granted ?

He can exercise no power as executor, further than to pay funeral charges and to do such acts as are necessary for the preservation of the estate. Willard on Ex. & Surr. 146.

13. Upon what theory can an executor recover damages for an injury to the personal property of the deceased, when such injury is committed after the death of the testator and before the probate of his will?

Upon the theory that the rights which existed in the testator during his life-time became at his death vested in his executor. The rights which the latter acquires after probate are, by a legal fiction, deemed to relate back to the time of the testator's death. Willard on Ex. & Surr. 147.

14. *If A, being a resident of this State, should die in the State of Ohio, in what court should application for probate of the last will of A be made?*

The application should be made in the court of the surrogate of the county of which the testator was an inhabitant immediately previous to his death. Willard on Ex. & Surr. 148.

15. *If A, being a resident of the State of Ohio, dies, leaving assets in this State, who will have jurisdiction to take proof of his last will and testament?*

If the death of A occurred within this State, then the surrogate of the county where such death occurred, and in which the testator left assets, has jurisdiction. But if the testator died out of this State, then the surrogate of the county where the testator left assets will have jurisdiction. But if the testator died in one county of this State, leaving assets in another county, it is probable that the surrogate of either county would have jurisdiction, as the case is left unprovided for by statute. Willard on Ex. & Surr. 148, 149.

16. *Who are the proper parties to prove a will before the surrogate?*

At common law an executor only was the proper person to cause a will to be proved. But under the Revised Statutes, either the executor, devisee or legatee named in the will, or any person interested in the estate, may prove the will before the surrogate. Willard on Ex. & Surr. 149.

17. *If the executor has not the will in his custody, how may he, or any other person interested, compel the production of the will before the surrogate for the purpose of proof?*

By serving the party having the custody of the will with a subpoena *duces tecum*. Willard on Ex. & Surr. 151.

18. *What formality must in all cases be observed before letters testamentary can issue to an executor?*

Letters testamentary cannot issue until the executor has made oath before the proper officer that he will faithfully and

honestly discharge the duties of an executor. Willard on Ex. & Surr. 161.

19. To whom should letters of administration be granted, in cases of intestacy ?

They should be granted to the relatives of the deceased, who would be entitled to succeed to his personal estate, in the following order : (1) To the widow ; (2) to the children ; (3) to the father ; (4) to the brothers ; (5) to the sisters ; (6) to the grandchildren ; (7) to any other of the next of kin who would be entitled to share in the distribution of the estate. Where the person entitled is a minor, letters should issue to his guardian, and, where neither relations or guardians will accept, then to the creditors of the deceased ; and if no creditor applies, then to any other person legally competent. If the intestate is a married woman, her husband is entitled to administration in preference to any other person. Willard on Ex. & Surr. 189-196.

20. Where the surrogate is satisfied that he has jurisdiction, and that a person applying is entitled to letters of administration, what proceedings are still necessary on the part of the applicant before such letters can issue ?

The applicant must take the oath required by the statute, that he will honestly and faithfully discharge the duty of administrator, according to law, and must give a bond, with two or more sureties, in a sum not less than double the value of the personal estate of which the intestate died possessed, for the faithful execution of the trust, and for obedience to the orders of the surrogate touching the administration of the estate committed to him. Willard on Ex. & Surr. 202.

21. In what cases will letters of administration, cum testamento annexo, be granted ?

(1) When the executors appointed by will have renounced, or failed to qualify, or are legally incompetent ; or (2) where, after partially administering the estate, all the executors have died, or have become incapable of acting, or the power exercised by them has been revoked. Willard on Ex. & Surr. 208.

22. State the order in which persons will be entitled to administration with the will annexed.

The letters should issue: (1) To the residuary legatees, or some one of them, if there are any; (2) To any principal or specific legatee; (3) To the widow and next of kin of the testator, or to any creditor of the testator, in the same manner and under like regulations and restrictions as letters of administration in cases of intestacy. Willard on Ex. & Surr. 208.

23. What are the powers and duties of an administrator with the will annexed?

He has the same rights and powers, and is subject to the same duties as if he had been named as executor in the will. It is his duty to observe and carry out the will of the deceased. Willard on Ex. & Surr. 209.

24. In what cases are letters of administration *de bonis non* granted in this State?

(1) Where a sole executor dies leaving the estate of his testator unadministered; or (2) where a sole administrator dies before having fully discharged the duties of his office. Willard on Ex. & Surr. 211.

25. What is the effect of granting letters of administration *de bonis non*, upon former letters testamentary, or of administration?

All former letters testamentary, or of administration upon the same estate, are superseded by letters of administration *de bonis non*. Willard on Ex. & Surr. 212.

26. What do you understand by an administration *durante minore aetate*?

It is that form of administration which is granted where a person, who has been appointed sole executor, is under the age of twenty-one years; or where, in case of intestacy, the right to administration has devolved, under the statute, upon one under that age. Willard on Ex. & Surr. 214.

27. Who are appointed administrators in such cases?

When the person entitled to the grant of administration

is an infant, the surrogate is required to make the grant to the guardian of the infant, if he is otherwise qualified and willing to accept it. This grant of administration ceases when the infant arrives at full age, and a grant of administration *de bonis non* is then made to the former infant, now an adult. Willard on Ex. & Surr. 218.

28. In what cases may a collector be appointed of the goods of a deceased person?

The surrogate may, in his discretion, issue special letters of administration, authorizing the collection and preservation of the goods of the deceased, in case of a contest relative to the proof of a will, or relative to granting letters testamentary or of administration with the will annexed, or of administration in cases of intestacy, or where, by reason of the absence from this State of an executor named in a will, or for any other cause, a delay is necessarily produced in granting such letters. Willard on Ex. & Surr. 220.

29. What were these forms of special administration termed at common law?

They were termed administrations *pendente lite*, and administrations *durante absentia*. Willard on Ex. & Surr. 219.

30. State generally the duties of a collector?

The duties of a collector are chiefly to collect the goods, chattels, personal estate and debts of the deceased, and to secure the same at such reasonable expense as the surrogate shall allow. For these purposes he may maintain suits as administrator. He may also sell such of the goods of the deceased as shall be necessary for the preservation and benefit of the estate, after the same has been appraised. It is his duty to return an inventory of the assets of the deceased within three months ; to account for all property, money and things in action received by him as collector, whenever required by the surrogate ; and to deliver up the same to the person or persons duly authorized to receive the same. Willard on Ex. & Surr. 220, 221.

31. When will letters testamentary be revoked?

Whenever it is clear that the executor has become incom-

petent by law to serve as such, or that his circumstances are so precarious as not to afford adequate security for his due administration of the estate, or that he has removed or is about to remove from the State, the surrogate may revoke the letters testamentary issued to him, and issue letters of administration with the will annexed, according to law. Willard on Ex. & Surr. 234.

32. What will be the effect upon all prior proceedings if, after letters of administration have been granted, and the administrator has entered in good faith upon the duties of his trust, a will of the supposed intestate is discovered and admitted to probate?

In that case, it will become necessary to revoke the letters of administration previously issued ; but all acts of the administrator done in good faith under the authority of such letters remain valid notwithstanding the subsequent discovery of the will. Willard on Ex. & Surr. 240.

33. State the order in which an executor or administrator should discharge the debts against the estate he has undertaken to administer ?

He should satisfy (1) debts entitled to preference under the laws of the United States ; (2) taxes assessed upon the estate ; (3) judgments docketed according to their priority ; (4) all recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts. Willard on Ex. & Surr. 274.

34. Which are entitled to priority of payment, debts or legacies ?

Debts must be paid before legacies except in some special cases provided for by law. Willard on Ex. & Surr. 293.

35. When all the claims against the estate are ascertained and the executor or administrator is satisfied that the assets are insufficient to pay all the debts, how should he proceed in the matter ?

He should first satisfy the claims entitled to priority and make a *pro rata* distribution of the residue among the remaining creditors. Willard on Ex. & Surr. 303.

36. *When all the claims against the estate have been satisfied, and it appears that there is not sufficient assets to pay all the legacies, how should the executor proceed?*

He should first discharge the specific legacies in full if there be sufficient assets, and should then proceed to satisfy the general legacies. The statute provides that if there be not sufficient assets to pay the general legacies, then an abatement of the general legacies shall be made in equal proportions. Willard on Ex. & Surr. 380.

37. *If, after an executor has paid the funeral charges and debts of the deceased and the general and specific legacies, there should still remain assets not bequeathed by the will, what disposition should be made of the surplus?*

He should distribute this surplus among the persons entitled to it under the statute of distributions. Willard on Ex. & Surr. 395.

38. *Where a married woman dies intestate and there remains a surplus of personal estate after payment of debts, upon what question does the mode in which the residue shall be distributed depend, under the amendment to the statute of distributions by the act of 1867?*

The question as to whom the residue of the personal estate shall be given after the payment of debts depends upon whether the wife left descendants surviving her or not. If the wife died leaving descendants, the husband becomes entitled to one-third of her personal estate ; but if she died leaving no descendants the husband is entitled to her entire personal estate. *Barnes v. Underwood*, 47 N. Y. (1 Sick.) 351 ; Laws of 1867, ch. 782, §§ 11, 12.

39. *Explain generally the doctrine of advancement?*

The Revised Statutes provide that where any child of a deceased person shall have been *advanced* by the deceased, by settlement or portion of real or personal estate, the value of such advancement must be reckoned with that part of the surplus of the personal estate which remains to be distributed among the children, and if such advancement be equal or superior to the amount which, according to the rules of distri-

bution, would be distributed to such child as his share of the surplus and advancement, then such child and his descendants are to be excluded from any share in the distribution of the surplus. But if such advancement be not equal to such amount, then such child or his descendants shall be entitled to receive so much only as shall be sufficient to make all the shares of all the children in such surplus and advancement equal as near as can be estimated. Willard on Ex. & Surr. 398.

40. *Will the fact that one child has been better educated and at a greater expense than the rest make the doctrine of advancement applicable in the distribution of the assets of the parent?*

It will not. Willard on Ex. & Surr. 398.

CHAPTER XVI.

EQUITY JURISPRUDENCE.

1. *What is to be understood by the term "equity?"*

In its most general and comprehensive sense, equity is often used to denote natural justice. In this sense it relates to the disposition which all should cherish of rendering to every one his due, rather than to a system of remedial justice. In a more restricted sense, it is used as denoting a rule of construction or interpretation ; and has been defined as "the correction of that wherein the law, by reason of its universality, is deficient." Willard's Eq. Jur. 37 ; 1 Shars. Bl. Com. 61.

2. *From whence arises the necessity of equity entering into every system of jurisprudence?*

Equity must have a place in every system of jurisprudence, in substance, at least, if not in name, because no system of human laws is so perfect but that cases must occur in which general rules cannot be applied without injustice, and perhaps not applied at all. It is the province of the judge so

to construe them, where they arise, as to accomplish the object of the lawgiver, if it can be done without violence to the letter. Willard's Eq. Jur. 38; 1 Story's Eq. Jur., § 7.

3. In what courts are equitable remedies usually administered?

In England, and in most of the American States, equity is administered in courts of equity, which are tribunals separate from courts of common law. Hence, equity jurisprudence has been said to be that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law. 1 Story's Eq. Jur., § 25.

4. Is equity regarded as a distinct branch of jurisprudence in this State?

Although the ancient *forms* of pleading have been abrogated in this State, and a uniform system of remedies has been established, yet the continuance of equity as a distinct branch of jurisprudence, and the application of equitable as well as legal remedies, are plainly inferable from the language of the Code, and have been repeatedly recognized by the courts. Willard's Eq. Jur. 36.

5. How was equity formerly administered in this State?

At an early period in our colonial history equity was administered by a tribunal separate from courts of law; and the constitution of 1777 recognized the office of chancellor and judges of the supreme court, and prescribed the tenure of their offices. The court of chancery and supreme court were organized as separate tribunals—the former as a court of equity, and the latter as a court of law. The two courts were continued, and their jurisdiction was preserved separate, by the constitution of 1821, and so remained until both were abolished by the constitution of 1846. Willard's Eq. Jur. 33.

6. How is equity administered at present in this State?

The present State constitution, adopted in 1846, creates a supreme court having general jurisdiction both in law and

equity. It provides that testimony be taken in equity cases in like manner as in cases at law; and it empowers the legislature to confer equity jurisdiction in special cases upon the county judge. Willard's Eq. Jur. 34.

7. What is the meaning of the common maxim, that "equity follows the law?"

In countries or States where equity is administered by different tribunals, this maxim is susceptible of various interpretations. It may mean that equity adopts and follows the rules of law in all cases; or, that in dealing with cases of an equitable nature, it follows the analogies of law. Though the maxim is thus true in certain senses, it admits of various exceptions. It cannot be said that where the law affords no remedy, there is none in equity; nor can it be affirmed that, in administering equity, no regard is had to the rules of law. 1 Story's Eq. Jur., § 64; Willard's Eq. Jur. 44, 45.

8. What maxim is applicable in a case where the equities are equal?

"Where the equities are equal, the law must prevail," for, in such case, the defendant has as good a right to the protection of the court as the plaintiff has to relief. When parties have been equally innocent and equally diligent, a court of equity leaves them as they were. If the defendant has an equal claim to the protection of a court of equity, to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interfere on either side. Willard's Eq. Jur. 45.

9. If the equities be unequal, what maxim prevails?

Whenever the equities are unequal, there the preference is constantly given to the superior equity. 1 Story's Eq. Jur., § 64 d.

10. To whom does the maxim, that "he who seeks equity must do equity," apply?

This maxim, which lies at the foundation of equity jurisprudence, principally applies to the party who is seeking relief in the character of a plaintiff. Thus, the borrower of

money upon usurious consideration could not, in this State, prior to the Revised Statutes of 1830, maintain a bill for discovery or relief, unless upon the terms of paying the lender the sum actually loaned, with lawful interest. Willard's Eq. Jur. 46.

11. In what cases is the maxim, "equality is equity," applied?

This maxim is variously applied, as, for example, to cases of contribution between co-contractors, sureties and others; to cases of abatement of legacies, where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of the land; and especially to cases of the marshaling and distribution of equitable assets. 1 Story's Eq. Jur., § 64*f*.

12. What is the meaning of the maxim, that "equity treats a thing as done which ought to be done?"

The true meaning of this maxim is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been; not as the parties might have executed them. Thus, it considers land, directed to be sold and converted into money, as money; and money, directed to be employed in the purchase of land, as land. 1 Story's Eq. Jur., § 64*g*; Willard's Eq. Jur. 47.

13. What are the three principal cases in which equity grants relief, as stated by Lord Coke?

They are fraud, accident and trust. 1 Story's Eq. Jur., § 59.

14. State some of the principal objects attainable by means of a court of equity.

Some of these objects are: The enforcement of trusts, the administration of estates, the protection of infants, relief in cases of fraud, accident or mistake, specific performance of contracts, proceedings against corporations in equity, etc. Willard's Eq. Jur. 49.

15. Give a definition of the term fraud, as it is employed in courts of equity.

Fraud is defined as any kind of artifice by which another is deceived. The term applies to all cases of surprise, trickery, cunning, dissembling or other unfair means used by one party to take advantage of another. But any act of omission or commission, contrary to legal or equitable duty, trust or justly reposed confidence, which results in injury to another, although it may fall short of moral fraud, is within the remedial jurisdiction of a court of equity, as a case of fraud. Willard's Eq. Jur. 147; 1 Story's Eq. Jur., § 187.

16. If a parent, unconscious of his insolvency and out of love and affection to his son, give him an estate, will equity allow him thus to defeat the claims of his creditors?

It will not; for implied or constructive frauds are as much within the remedial jurisdiction of a court of equity, as positive, actual fraud. Nor can he, in the eye of a court of equity, escape the imputation of fraud, by evidence that he was ignorant of his insolvency, and governed rather by motives of love toward his son, than by a design to cheat his creditors. Equity accepts no such apology for acts, or omissions, which tend directly to fraud. Willard's Eq. Jur. 147.

17. What is to be understood by the common maxim that "fraud is odious and never to be presumed?"

It means merely that the burden of proof is cast upon him who asserts fraud. It does not mean that guilt or fraud may not be established by presumptive evidence, for, in truth, they are established by that species of evidence in most instances. Willard's Eq. Jur. 148.

18. From what two sources do the most obvious cases of actual fraud arise?

From misrepresentation, or an undue concealment. In order to constitute a fraud of the first class, it is said there must be a representation, express or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his contract, or act. Undue concealment is the non-disclosure of

those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other ; and which the latter has a right to know. Willard's Eq. Jur. 148; 1 Story's Eq. Jur., § 207.

19. Are there any cases of fraud against which equity will afford no relief ?

There are ; and generally equity will not interfere where ample relief may be had at law. Thus fraud in obtaining a will, or devise of lands, is exclusively cognizable in a court of law. 1 Story's Eq. Jur., §§ 59, 60, 184.

20. Is an accord and satisfaction available as a defense in equity ?

It is, the same as at law. In all cases of fraud, whether by misrepresentation or concealment, if the injured party, with full knowledge of the fraud, settles the matter and releases the party who has defrauded him, he has no longer any legal or equitable claim to relief against such voluntary act. 1 Story's Eq. Jur., § 203.

21. Is a willful misrepresentation of a fact sufficient to avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to believe it ?

It is not, for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion in matters of this sort. Story's Eq. Jur., § 199.

22. How does a court of equity regard the acts and contracts of persons who are of weak understandings ?

The doctrine may be laid down as generally true, that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence. 1 Story's Eq. Jur., § 238.

23. Does mere inadequacy of price constitute a sufficient ground to avoid a bargain in equity?

It does not ; for courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses ; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon. 1 Story's Eq. Jur., § 244.

24. Will equity grant relief against acts done, and contracts made by a person in a state of drunkenness, where they are procured by the fraud or imposition of the other party?

It will ; but it must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding ; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part ; and without this, no contract or other act can or ought to be binding. 1 Story's Eq. Jur., § 231 ; Willard's Eq. Jur. 200.

25. What must be the nature of the cases of surprise and sudden action, against which relief will be afforded by a court of equity?

Such cases must be accompanied with fraud and circumvention, or, at least, by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him ; and, like other acts of fraud, must be proved, or presumed from the facts and circumstances of the case. 1 Story's Eq. Jur., § 251 ; Willard's Eq. Jur. 205.

26. Give some instances of constructive frauds, against which relief will be afforded in equity.

Among these may be placed contracts and agreements respecting marriage, by which a party engages to give another a compensation if he will negotiate an advantageous marriage

for him ; contracts in restraint of marriage ; bargains and contracts made in restraint of trade ; contracts for the buying, selling, or procuring of public offices ; and agreements founded upon corrupt considerations. 1 Story's Eq. Jur. 289-326.

27. Upon what ground do courts of equity interfere in the cases instanced ?

They interfere in such cases, not from any regard for the damage sustained by the individuals concerned, but from considerations of public policy. 1 Story's Eq. Jur., § 261.

28. When it is said that relief may be obtained in equity against accidents, what is meant by the term accident ?

By this term is intended, not merely inevitable casualty, but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party. 1 Story's Eq. Jur., § 78.

29. In what case of accident only will the interposition of a court of equity be justified ?

(1) When a court of law cannot grant suitable relief; and, (2) when the party has a conscientious title to relief. Both grounds must concur in the given case ; for otherwise a court of equity not only may, but is bound, to withhold its aid. 1 Story's Eq. Jur., § 74.

30. What are the most ordinary instances in which this jurisdiction of a court of equity is exercised ?

The most ordinary instances are those of lost bonds, and negotiable securities, the non-production of which would defeat an action. And in these cases the decree is not confined to a re-execution, but, to avoid circuity of action, extends to payment. Adams' Equity, 167, 337.

31. In order that a party may be enabled to come into equity for relief in case of a lost deed, what must he establish ?

In such case he must establish that there is no remedy at law, or no remedy which is adequate and adapted to the circumstances of the case. 1 Story's Eq. Jur., § 84.

32. In what cases of accident, other than those founded on lost instruments, will equity grant relief?

It may be stated generally that, where an equitable loss or injury will otherwise fall upon a party from circumstances beyond his own control, or from his own acts done in entire good faith, and in the performance of a supposed duty, without negligence, courts of equity will interfere to grant him relief. 1 Story's Eq. Jur., § 89.

33. Give a case in illustration of this general statement.

If an executor or administrator should receive money, supposed to be due from a debtor to the estate, and it should turn out that the debt had been previously paid, and, before the discovery, he had paid away the money to creditors of the estate, in such case the supposed debtor may recover back the money in equity from the executor; and the latter may, in the same manner, recover it back from the creditors, to whom he paid it. 1 Story's Eq. Jur., § 91.

34. State some instances in which equity will not afford relief against accident.

A court of equity will not afford relief against an accident which has happened in consequence of the gross negligence of the party seeking relief, nor where the party has not a clear, vested right; but his claim rests in mere expectancy, and is a matter not of trust, but of volition. And in matters of positive contract and obligation, created by the party, it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident; or that he has been in no default; or that he has been prevented, by accident, from deriving the full benefit of the contract on his own side. 1 Story's Eq. Jur., §§ 101, 105; Willard's Eq. Jur. 57.

35. Will equity interfere on the ground of accident against a bona fide purchaser, for a valuable consideration, without notice?

It will not; for, in the view of a court of equity, such a purchaser has as high a claim to assistance and protection as any other person can have. 1 Story's Eq. Jur., § 108.

36. Define "mistake" in the sense of a court of equity, and state how mistakes are divided.

Mistake is sometimes the result of accident, in a large sense, and, as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. Mistakes are ordinarily divided into two sorts: mistakes in matter of law, and mistakes in matter of fact. 1 Story's Eq. Jur., § 110.

37. May a party be relieved in equity where the mistake he has committed has been the result of ignorance or mistake of the law?

The maxim that "ignorance of the law will excuse no man" is equally as much respected in equity as in law; and it has accordingly been laid down as a general proposition, that in courts of equity ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts. 1 Story's Eq. Jur., § 111.

38. Will a court of equity afford relief in case of ignorance or mistake of fact?

The general rule is, that an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity; but the party asking relief must make his complaint with reasonable diligence. 1 Story's Eq. Jur., § 140; Willard's Eq. Jur. 69.

39. What is the ground of the distinction between ignorance of law and ignorance of fact?

Every man of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports, when he knows all the facts; hence, it is regarded as culpable negligence in him to do an act, or to make a contract, and then to set up his ignorance of law as a defense. But no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge, and, therefore, an ignorance of facts does not import culpable negligence. 1 Story's Eq. Jur., § 140.

40. *A buys an estate of B, to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, unknown at the time to both parties, that B has no title (as if there be a nearer heir than B, who was supposed to be dead, but is, in fact, living). In such a case would A be entitled to relief in equity?*

He would, because the contract was materially affected by his ignorance or mistake of facts. But if A were to sell an estate to B, whose location were well known to each, and they mutually believed it to contain twenty acres, and in point of fact it only contained nineteen acres and three-fourths of an acre, and the difference would not have varied the purchase in the view of either party ; in such a case the mistake would not be a ground to rescind the contract. 1 Story's Eq. Jur., § 141.

41. *In cases of mutual mistake going to the essence of the contract, is it necessary that there should be any presumption of fraud, to justify the interference of a court of equity?*

It is not ; and, on the contrary, equity will often relieve, however innocent the parties may be, as, where the property which one party intended to sell, and the other intended to buy, did not in fact exist ; or where the subject-matter of the sale and purchase is so materially variant from what the parties supposed it to be that the substantial object of the sale and purchase entirely fails. Willard's Eq. Jur. 69.

42. *If a party has lost his cause at law from the want of proof of a fact, which, by ordinary diligence, he could have obtained, will he be granted relief in equity?*

He will not, for the general rule is, that if the party becomes remediless at law by his own negligence, equity will leave him to bear the consequence. 1 Story's Eq. Jur., § 146.

43. *If A, knowing that there is a mine in the land of B, of which he knows that B is ignorant, should buy the land, without disclosing the fact to B, for a price in which the mine is not taken into consideration, would B be entitled, in equity, to relief from the contract?*

He would not, because A, as the buyer, is not obliged, from the nature of the contract, to make the discovery. 1 Story's Eq. Jur., § 147.

44. *Give an instance of one of the most common classes of cases in which relief is sought in equity on account of a mistake of facts.*

One of the most common classes of cases is that of written agreements, either executory or executed. Sometimes, by mistake, the written agreement contains less than the parties intended ; sometimes it contains more ; and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. 1 Story's Eq. Jur., § 152 ; Willard's Eq. Jur. 72.

45. *What is the rule in equity as to granting relief, in case of mistakes in wills ?*

The mistakes must be such as are apparent on the face of the will, or may be made out by a due construction of its terms ; otherwise no relief can be granted. Evidence of matter *dehors* the will to show the mistake is not sufficient, although it is admissible to remove a latent ambiguity. Willard's Eq. Jur. 82 ; 1 Story's Eq. Jur., § 179.

46. *What is the rule of equity in the construction of wills ?*

The cardinal rule in this respect is, that the intention of the testator is to govern, if consistent with the rules of law ; that is, the testator cannot create a trust which the law prohibits, or suspend the power of alienation, or the absolute ownership of property, beyond the period allowed by law ; nor create any other interest in property which the law repudiates. Willard's Eq. Jur. 490.

47. *When the words of one part of a will are capable of a two-fold construction, how should they be construed ?*

In such case, that construction should be adopted which is most consistent with the intention of the testator, as ascertained by other provisions in the will. And when the intention is incorrectly expressed the court will effectuate it by supplying the proper words. Willard's Eq. Jur. 491.

48. What is the ground of the jurisdiction of courts of equity to decree the specific performance of contracts?

The ground of this jurisdiction is, that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. Wherever, therefore, the party wants the thing *in specie*, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. 2 Story's Eq. Jur., § 716.

49. Does the equity to a specific performance arise upon a merely "gratuitous" promise?

It does not, and chancery will never decree, specifically, a mere voluntary agreement. The contract must be supported by a valuable consideration, or, at least, by what a court of equity considers a meritorious consideration, as payment of debts, or making provision for a wife or child. Willard's Eq. Jur. 263.

50. Is the specific execution of a contract in equity a matter of absolute right in the party, or is it a matter resting in the discretion of the court?

It rests wholly in the sound discretion of the court, which withholds or grants relief, according to the circumstances of each particular case ; and in the exercise of its extraordinary jurisdiction, in such cases, the court, though not exempt from the general rules and principles of equity, acts with more freedom than when exercising its ordinary powers. Greater latitude will be allowed to the defendant in resisting than will be allowed to the plaintiff in making out his case. Willard's Eq. Jur. 267.

51. In what cases will courts of equity not decree a specific performance?

In cases of fraud or mistake, or of hard and unconscionable bargains ; or where the decree would produce injustice ; or where it would compel the party to an illegal or immoral act ; or where it would be against public policy ; or where it would involve a breach of trust ; or where a performance has

become impossible ; and generally not in any case where such a decree would be inequitable under all the circumstances. 2 Story's Eq. Jur., § 769.

52. In general, what must a party show to entitle him to a specific performance ?

He must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps toward the performance on his own part. If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his complaint will be dismissed ; for courts of equity do not, any more than courts of law, administer relief against the gross negligence of suitors. 2 Story's Eq. Jur., § 771.

53. Will equity compel the specific performance of an agreement in favor of a party, against whom the same could not be enforced ?

No ; for mutuality and certainty are, in general, indispensable requisites to the granting of relief. If the party seeking to enforce the agreement was not himself liable, and the same could not be enforced against him, there is no reciprocity in allowing him to enforce it against the other party. Willard's Eq. Jur. 267.

54. Into how many, and what general heads, may agreements be divided which courts of equity will specially enforce ?

Into three ; 1. Those which relate to personal property ; 2. Those which relate to personal acts ; and 3. Those which relate to real property. The remedy, in equity, however, in the cases comprehended under these heads, is not co-extensive with the wrongs which may happen under them. Willard's Eq. Jur. 271.

55. In what cases will courts of equity enforce the specific execution of contracts relating to personal property ?

Ordinarily, courts of equity do not enforce such contracts, because courts of law usually afford a complete remedy ; yet, whenever a violation of the contract cannot be correctly

estimated in damages, or, wherever, from the nature of the contract, a specific performance is indispensable to justice, a court of equity will not be deterred from interfering, because the contract relates to personal property. Willard's Eq. Jur. 275, 276.

56. *What is the nature of the personal acts with respect to which courts of equity entertain jurisdiction to decree performance specifically?*

Such acts must have reference to property of some kind; and there is none where a contract for personal services alone has been *actively* enforced, though the court has sometimes interfered *negatively*. Thus, in the case of a theater considered as a partnership, a contract with the proprietors not to write dramatic pieces for any other theater, is valid, and a violation of it will be restrained by injunction. Willard's Eq. Jur. 277.

57. *Give some instances where personal covenants will be decreed to be enforced by courts of equity.*

Numerous cases of this kind arise between landlord and tenant, and in cases of partnership. Thus, a covenant to give a lease, or to renew a lease, has been required to be executed, and to contain also a covenant for a further renewal. So an agreement to form a partnership, and execute articles accordingly, may be specifically enforced. So a covenant to sustain and repair the banks of a river. Willard's Eq. Jur. 278.

58. *Under what two heads may the cases be considered, in which equity grants specific performance of contracts relative to land?*

First, where relief is sought upon parol contracts within the statute of frauds; and, second, where it is sought under written contracts, not falling within the scope of that statute. 2 Story's Eq. Jur., § 745.

59. *Why is it, that courts of equity exercise a more extensive jurisdiction in compelling the specific performance of contracts relative to land, than in those relating to personal property?*

In regard to contracts respecting personal property, it is

generally true, that no particular or peculiar value is attached to any one thing over another of the same kind ; and that a compensation in damages meets the full merits, as well as the full objects, of the contracts. But it is otherwise with respect to contracts relative to real estate. Here the jurisdiction to enforce performance is universal, because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to a purchaser, to whom the land may have a peculiar and special value. 2 Story's Eq. Jur., § 746 ; Willard's Eq. Jur. 279.

60. *Upon what principle do courts of equity entertain jurisdiction, and compel the performance of agreements within the statute of frauds, and for the breach of which no action would lie at law ?*

Courts of equity, as well as courts of law, are alike bound by the statute ; but whenever they intervene to enforce contracts, not made in conformity to the statute, they do so, not out of disregard to the act, but for the purpose of administering equities which exist in subordination to its spirit, and in no respect inconsistent with its policy, or where the parties themselves have waived its protection. Willard's Eq. Jur. 281, 282 ; 2 Story's Eq. Jur., § 754.

61. *Give some instances in which courts of equity will enforce a specific performance of a contract within the statute, though not in writing.*

The cases of most frequent occurrence are where the parol agreement has been partly carried into execution ; or, where the terms for the performance and completion of the contract have not, in point of time, been strictly complied with. So where a parol contract is definitely stated in the bill, and admitted in the answer, and the statute is not urged as a bar, a specific performance will be enforced. 2 Story's Eq. Jur., §§ 759, 776 ; Willard's Eq. Jur. 282.

62. *Upon what principle do courts of equity enforce specific performance, if the contract be partly executed by the party seeking relief ?*

The principle in such cases is that, if one of the contract-

ing parties induces the other so to act, that if the contract be abandoned, he cannot be restored to his former position, the contract must be considered as perfected in equity, and a refusal to complete it at law is in the nature of a fraud. Willard's Eq. Jur. 283.

63. Point out the distinction between the case of a vendor coming into a court of equity to compel a vendee to performance, and of a vendee resorting to equity to compel a vendor to perform.

In the first case, if the vendor cannot make out a title as to part of the subject-matter of the contract, equity will not compel the vendee to perform the contract *pro tanto*. But where a vendee seeks a specific execution of an agreement, there is much greater reason for affording him the aid of the court, when he is desirous of taking the part to which a title can be made. Willard's Eq. Jur. 286; 2 Story's Eq. Jur., §§ 777-780.

64. What must the plaintiff, who seeks for the specific performance of an agreement, show, in order that he may be entitled to the relief sought?

He must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant. For if the plaintiff will not, or, through negligence, cannot, perform the whole on his side, he has no title in equity to the performance of the other party, since such performance could not be mutual. Willard's Eq. Jur. 291.

65. In contracts relative to real estate, is it always an indispensable requisite, to the granting of relief in equity, that the party seeking relief has himself performed precisely at the day?

It is not. If he has not been guilty of gross neglect; if his laches can be reasonably explained, and be shown to be consistent with fairness and good faith; if the delay can be compensated to the other party, and time has not been made material by the contract of the parties, a court of equity will still afford relief. Willard's Eq. Jur. 293.

66. Will equity, in any case, compel a vendee to accept the conveyance of a doubtful title?

It will not. But if there be a defect in the paper title of the vendor, it seems that if his possession under color of title has been sufficient to establish a good adverse possession, it is sufficient to be the ground of a decree. So if he is able to give a good title at the time of the decree, it will be sufficient. Willard's Eq. Jur. 295; 2 Story's Eq. Jur., § 777.

67. What relief is afforded, in equity, where deeds, or other instruments in writing, relating to the title of property, are illegally withheld from the party entitled to them?

In such case, although an action at law will lie, damages only can be recovered; but equity administers a better and more efficient remedy, by requiring the delivery of the instrument to the party to whom it belongs. The heirs at law, or devisees, or any party standing in legal privity with them, and who are entitled to the possession of the muniments of their title, may maintain a bill for the delivery to them of such title deeds. Willard's Eq. Jur., § 695; id. 307.

68. What is meant in equity by a bill, *quia timet*?

Bills, *quia timet*, are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief. 2 Story's Eq. Jur., § 826.

69. In what manner is this aid given by courts of equity?

The manner is dependent upon circumstances. Sometimes they interfere by the appointment of a receiver to receive rents or other income; sometimes by an order to pay a pecuniary fund into court; sometimes by directing security to be given, or money to be paid over, etc. 2 Story's Eq. Jur., § 826.

70. What is an injunction, and name the different kinds of injunctions?

An injunction is a mandate in writing, issued by a court

or officer of competent jurisdiction, either under the seal of the court or by order, commanding the party to whom it is addressed to do, or to refrain from doing, some particular thing, as is required in such writ or order. With reference to their *duration*, injunctions are of two kinds, *preliminary* and *final*; the former being granted *before* and the latter *after* the final decree or judgment in the cause. With reference to their *objects*, they are also of two kinds: commanding a party to do, or to refrain from doing, a particular thing. Willard's Eq. Jur. 341; 2 Wait's Pr. 1.

71. Is the granting of an injunction a matter of strict right, or does it rest in the discretion of the court?

The *final* injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the cause; but the granting of a *preliminary injunction* always rests in the discretion of the court. Willard's Eq. Jur. 342; 2 Wait's Pr. 3.

72. State a few of the ordinary cases in which courts of equity grant injunctions?

They are: To restrain vexatious suits; to restrain the alienation of property; to restrain the waste; to restrain nuisances; to restrain trespasses, and to prevent other irreparable mischiefs. Story's Eq. Jur., § 873.

73. Will a court of equity interfere by an injunction, in a case where there is an adequate remedy at law?

Generally, it will not. Thus a court of equity will not disturb the verdict of a jury because the damages are excessive; relief in such cases in courts of law being fully adequate. Story's Eq. Jur., § 864; Willard's Eq. Jur. 358; 2 Wait's Pr. 6.

74. In what cases only will courts of equity grant an injunction to restrain a public nuisance?

In those cases only where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting, and the injury to the public doubtful, that alone will constitute a ground for withholding this extra-

ordinary interposition. Story's Eq. Jur., § 924, *a*; 2 Wait's Pr. 19, 20.

75. Upon what is the interference of courts of equity, by way of injunction, founded, as regards private nuisances?

Such interference is founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. A mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. Story's Eq. Jur., § 925.

76. Has a party, by whom private letters have been written and sent to another person, any property absolute or qualified in the letters so sent as regards the person receiving them? If so, under what circumstances, to what extent, and in what way can he assert his title to this species of property in a court of equity?

A person writing a letter and sending it only parts with the property in it for the purposes for which it was sent. Therefore the party receiving it has no right to publish it without the permission of the author. The publication will, therefore, be restrained if carried further than is necessary to carry out the writer's wishes. An injunction is the proper remedy. Story's Eq. Jur., § 944; 2 Wait's Pr. 54.

77. Upon what principle do courts of equity restrain any publication by injunction?

Upon the principle of protecting the rights of property in the book or letters sought to be published. To justify the interference of the court there must be an invasion by the defendant of the rights of property of the plaintiff, or some direct breach of confidence connected therewith. Story's Eq. Jur., § 948.

78. If secrets have been communicated by one person to another in the course of a confidential employment, will courts of equity interfere by injunction to restrain the disclosure of such secrets?

They will, and it matters not, in such cases, whether the

secrets be secrets of trade or secrets of title, or any other secrets of the party, important to his interests. Story's Eq. Jur., § 952.

79. To what extent has a court of equity jurisdiction to interfere in cases of public functionaries, who are exercising public trusts or functions?

The established doctrine is, that as long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, a court of equity will not interfere. Story's Eq. Jur., § 955, *a*.

80. In what cases will a court of equity refuse the granting of an injunction?

No injunction will be granted whenever it will operate oppressively, or inequitably, or contrary to the real justice of the case; or where it is not the fit and appropriate mode of redress under all the circumstances of the case; or where it will or may work an immediate mischief, of fatal injury. Story's Eq. Jur. 959, *a*.

CHAPTER XVII.

PLEADING.

1. What is meant by the term pleading as used in law?

A pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense. Gould's Pl. 2; 3 Bl. Com. 292, note; 2 Wait's Pr. 285.

2. In what manner do the pleadings assist in facilitating the settlement of a controversy?

By narrowing down the questions in controversy to a direct affirmation of fact or a conclusion of law on the one side, and an equally direct denial of the same upon the other. Gould's Pl. 10; 2 Wait's Pr. 285.

3. What legal phrase is used to describe the condition of the cause when this point has been reached in the pleadings?

The cause is then said to be *at issue*, and is ready for trial. Wait's Code, 442; Gould's Pl. 9, 279; 2 Wait's Pr. 463.

4. Give an analysis of the first pleading on the part of the plaintiff, showing its logical construction.

The first pleading of the plaintiff should consist: 1. Of a major proposition, which is the assertion of an abstract legal principle to the effect that the plaintiff has a legal right to recover damages against one who has done or omitted to do a specified act; 2. Of a minor proposition, which consists in a direct allegation that the defendant has done or has omitted to do that act; and, 3. Of the conclusion or legal inference resulting from the law and fact together as they appear in the premises, that the plaintiff has a legal right to recover damages of the defendant. Gould's Pl. 5.

5. Are these logical parts of the pleading actually expressed?

The major proposition, or legal principle upon which the plaintiff founds his claim, is never actually expressed in the pleading, as it is sufficiently indicated by the nature of the facts alleged together with the demand contained in the prayer for judgment. Gould's Pl. 11.

6. What is this first pleading on the part of the plaintiff called?

Under the old system of pleadings it was called the *declaration* or *count*, but under the Code it is termed the *complaint*. Gould's Pl. 16; 3 Bl. Com. 393; Wait's Code, 184, § 141.

7. In what manner might the defendant, under the old system of pleadings, resist the legal inference that he was liable to the plaintiff in damages?

In three ways, viz.: 1. By denying the major proposition, or, in other words, by denying that the facts as alleged would render him liable to the plaintiff in damages, thus raising an issue of law; or 2. By denying the minor proposition

or allegation, that such acts were done by the defendant, thus raising an issue of fact; or 3. By leaving the major and minor proposition undenied, but setting up instead, *new matter*, inconsistent with a legal right in the plaintiff to recover damages of the defendant, thus impliedly denying the plaintiff's rights to recover damages. Gould's Pl. 6.

8. What additional mode of defense is given by the Code by way of allegation of new matter?

Under the old system of pleading the new matter which the defendant was allowed to set up in his pleading was confined wholly to facts constituting a defense *by way of avoidance*, as, for example, a plea of license in an action for trespass; but under the Code, the defendant is allowed to set up a *counter-claim* by way of defense, or, in other words, to set up facts showing a right of action against the plaintiff. Wait's Code, 242, 262; Gould's Pl. 6; 2 Wait's Pr. 427.

9. What is the first pleading on the part of the defendant called?

It may be either a *demurrer* or *answer*. If it denies the legal sufficiency of the complaint as a pleading, it is a *demurrer*; but if it denies the facts set up in the complaint, or sets up new matter either in avoidance of it, or in the form of a demand against the plaintiff, it is an *answer*. Wait's Code, 232, 242, §§ 143, 149.

10. When the answer contains no denials of any fact set up in the complaint, but sets up a defense based wholly on new matter, how may the plaintiff resist the legal inference, arising from the facts so alleged, that he is not entitled to recover damages against the defendant, or at least to the amount claimed?

The plaintiff may deny that the answer of the defendant constitutes any defense to his claim, and thus raise an issue of law; or he may deny the facts upon which the defendant bases his claim for damages, and thus raise an issue of fact. Wait's Code, 277, § 153.

11. What is the second pleading on the part of the plaintiff called?

It may be either a *demurrer* or a *reply*. If it denies the legal sufficiency of the answer as a pleading, it is a *demurrer*; but if it denies the facts set up in the answer, or sets up other facts as a defense to those set up in the answer, it is a *reply*. Wait's Code, 270, § 155.

12. What further pleading is allowed the defendant, after the service of the reply upon him?

He may demur to the reply, if it fails to constitute a defense to the answer. Wait's Code, 270, § 155.

13. What was the limit to the number of pleadings allowed under the old system?

Theoretically there was no limit to the number of pleadings under the old system, as each party had a right to allege new matter at any stage of the pleadings, so long as new matter was alleged against him. Practically, however, the extreme limit of the pleadings was the *surrebutter*. Gould's Pl. 8, 26.

14. State, in their order, the names of the different pleadings known under the former system.

The pleadings under the old system were : The declaration or count, the plea, the replication, the rejoinder, the surrejoinder, the rebutter, and the surrebutter. Gould's Pl. 26.

15. What is the source or origin of the present system of pleading?

The present system of pleading is almost wholly the creation of the Code, which abolished all existing forms of pleading, and declared that thereafter the forms of pleading in civil actions, in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by that act. Wait's Code, 181 ; 2 Wait's Pr. 285.

16. Are any of the old forms of pleading retained under the Code?

All common-law forms of pleading are absolutely abolished by the Code, and have ceased to be of any authority as

precedents ; but forms authorized by positive statute are retained under the Code, so far as they are not inconsistent with its provisions. Wait's Code, 181 ; 2 Wait's Pr. 292.

17. How far has the Code abolished the former rules of pleading ?

The Code has abolished the technical rules of pleading so far as to destroy their binding force, and substituted its own rules instead ; but the Code has not abolished those rules which good sense prescribes, and which are necessary to carry into effect its own provisions. *Fry v. Bennett*, 5 Sandf. 69 ; S. C., 1 Code R. N. S. 249 ; 2 Wait's Pr. 291.

18. How must pleadings be written ?

Pleadings must be fairly and legibly written or printed, on paper or parchment, in the English language, and without any abbreviations, except such as are in common use. Rule 26, Supreme Court (Wait's Code, 832) ; 2 Wait's Pr. 297.

19. What is the rule of the court in respect to indorsing and folioing pleadings ?

Rule 26 of the supreme court provides that every pleading exceeding two folios in length must be distinctly numbered and marked, at each folio, in the margin, and that all copies, either for the parties or the court, must be numbered or marked in the margin, so as to conform to the original draft and to each other, and must be indorsed with the title of the cause. Wait's Code, 832 ; 2 Wait's Pr. 297.

20. How and when would you take an objection to a pleading, on the ground that it was not folioed ?

By returning it, within twenty-four hours from its receipt, with a statement of the defect objected to. 2 Wait's Pr. 297.

21. If more than one distinct cause of action, defense, counter-claim or reply are set up in the same pleading, how must they be stated ?

They must be separately stated, and also plainly numbered. Wait's Code, 832 ; Rule 25, Supreme Court ; 2 Wait's Pr. 299.

22. What phrase is commonly employed to introduce and distinguish every additional cause of action in a complaint?

Causes of action following that first stated in the complaint are commonly introduced and distinguished by the phrase, "And for a further cause of action the plaintiff complains," etc., or other equivalent words. Wait's Code, 382, note a; 2 Wait's Pr. 299.

23. What is the proper procedure on the part of the defendant upon being served with a complaint in which several causes of action are combined in a single statement, in violation of rule 25 of the supreme court?

The defendant may move (1) to set aside the pleading as irregular; or (2) to strike out as irrelevant or redundant all that does not pertain to a single cause of action; or (3) to have the pleading made more definite and certain. Wait's Code, 832, notes b, c; 2 Wait's Pr. 299.

24. Within what time must notice be given of a motion to strike out of any pleading, matter alleged to be irrelevant or redundant, or to correct any pleading on the ground that it is indefinite or uncertain?

Notice must be given within twenty days from the service of the defective pleading, and before the service of a demurrer or answer thereto. Wait's Code, 299, 833; Rule 28, Sup. Ct.; 2 Wait's Pr. 482.

25. Is it necessary that a pleading should be dated?

It is not strictly necessary, but pleadings are usually dated. Wait's Code, 189, note j; 2 Wait's Pr. 300.

26. Is it necessary that a pleading should be subscribed?

It is. The Code requires that every pleading in a court of record should be subscribed by the party or his attorney. Wait's Code, 280, § 156; 2 Wait's Pr. 301.

27. What is the remedy against an omission to subscribe a pleading?

The party upon whom the defective pleading is served should promptly return it with a statement of the defect. Wait's Code, 280, note b; 2 Wait's Pr. 301.

28. If the copy pleading served is defective in any respect, will such defect be cured by showing that the original was correct?

It will not. The party receiving a pleading is justifiable in assuming that the copy of a pleading served upon him is an exact counterpart of the original, and he may treat it as such. Wait's Code, 281, note *a*, 243, note *e*; 2 Wait's Pr. 302.

29. Are facts to be stated in a pleading according to their legal effect, or as they actually exist?

As a general rule, facts should be stated in a pleading as they actually exist, and not according to their legal effect. Wait's Code, 195. But see Gould's Pl. 43; 2 Wait's Pr. 305.

30. What do you understand by the term "facts" as used in the Code?

By the term "facts" is meant actual occurrences or events, and not true statements. A statement may be true and yet not be a fact as the term is used in pleading. Thus, an allegation that a party is the "*bona fide* holder and owner" of a note may be true, but is not a fact, but a conclusion of law. By "facts" must be understood physical facts as distinguished from mere evidence of these facts, or from conclusions of law. Wait's Code, 189; 2 Wait's Pr. 306.

31. Is it ever necessary to state in a pleading the conclusions of law which necessarily arise from the facts set forth?

It is not. A statement of a conclusion of law is never a necessary part of a pleading. Wait's Code, 195; 2 Till. & S. Pr. 10; 2 Wait's Pr. 306.

32. State generally what facts must be set forth in a pleading.

As the office of a pleading is to present the cause of action on one side, and the defense on the other, it is necessary that the pleader should set forth every fact which must be proved on the trial to maintain the action or support the defense. Wait's Code, 193, 250; Gould's Pl. 39; 2 Wait's Pr. 309.

33. Is it necessary to allege any fact in a pleading which need not be proved upon the trial?

It is not. Wait's Code, 193, 195; 2 Wait's Pr. 313.

34. What will be the effect if insufficient facts are stated in a pleading?

The pleading will not only be subject to demurrer, but the pleader will also be precluded from proving on the trial any fact not set forth in the pleadings. Wait's Code, 237, 250, note e; 2 Wait's Pr. 310.

35. Is it necessary to directly allege any fact necessarily implied?

It is not. Gould's Pl. 40; Wait's Code, 194; 2 Wait's Pr. 315.

36. Is it proper to insert in a complaint matter independent of the cause of action, and which may show the plaintiff entitled to a provisional remedy?

It is not, as such matters have no place in a pleading. Wait's Code, 193.

37. Is hypothetical pleading ever allowable?

It is, where such pleading is interposed in good faith or from necessity. Hypothetical pleading is, however, always objectionable, and is not regarded with favor by the courts. Wait's Code, 251, note i; Gould's Pl. 55, note; 2 Wait's Pr. 308.

38. What do you understand by matter of inducement?

Matter of inducement is that which is merely introductory to the essential ground or substance of the cause of action or defense, or explanatory of it, or of the manner in which it arose. Gould's Pl. 42; 2 Wait's Pr. 298.

39. Are matters of inducement proper or necessary in pleadings under the Code?

They are both proper and necessary where the matters so pleaded are not mere legal fictions. Gould's Pl. 42, note; 2 Wait's Pr. 298.

40. What do you understand by matter of aggravation?

It is that which, in actions for forcible injuries, is intended to show the circumstances of enormity under which the principal wrong was committed. Gould's Pl. 42.

41. What is surplusage?

It is that which is impertinent or entirely superfluous, as not being necessary either to the substance or form of pleading. Gould's Pl. 43, 142.

42. Is it necessary, in a complaint showing the indebtedness of the defendant to plaintiff, to allege non-payment, or that the right of action is not barred by the statute of limitations?

It is not. It is neither necessary nor proper to anticipate and avoid in a pleading the defense of the adverse party. Wait's Code, 194; Gould's Pl. 75; 2 Wait's Pr. 314.

43. If a statute declares a deed or contract void unless it is made in specified form or upon a specified consideration, is it necessary to allege, in an action upon such deed or contract, facts showing that the deed or contract was valid notwithstanding the statute?

It is. It is a general rule that where a statute declares that a deed or contract is void, if, or *provided* it is made in a particular manner or upon a specified consideration, it is not necessary that the pleader should state facts showing that it was not so made; but where a statute makes a deed or agreement void *unless* made upon a specified consideration, or under specified circumstances, the rule is reversed, and the pleader must show that the circumstances exist under which alone the deed or contract can have validity. Wait's Code, 194, 195.

44. In an action founded upon a violation of a general statute is it necessary to refer to the statute or in any way recite or mention it in the pleadings?

It is not. Facts which the court takes judicial notice of need not be pleaded. Wait's Code, 195, 302; 2 Wait's Pr. 316.

45. What is the rule in regard to pleading private statutes?

Under the old system of pleading, where the cause of action arose by virtue of the provisions of some private statute, it was not only necessary to *plead* such statute, that is, to state the facts which would bring the case within the statute, but also to *recite* so much of the statute itself as was material to the case. But the Code provides that "in pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof." Wait's Code, 302, § 163; Gould's Pl. 46; 2 Wait's Pr. 328.

46. What is the rule in respect to pleading the laws of other States?

When the laws of other States are depended upon to sustain an action or defense, they must be pleaded as facts, as the court will not take judicial notice of the laws of other States. Wait's Code, 302, note f; 2 Wait's Pr. 316.

47. What is the most important rule to be observed in respect to the mode or manner of stating facts?

All matter incorporated in a pleading must be clearly and distinctly stated so that the precise nature of the charge or defense may be apparent to the court and to the adverse party. Gould's Pl. 71.

48. What remedy is given by the Code against indefinite and uncertain pleadings?

The Code provides that when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made more definite and certain by amendment. Wait's Code, 293, § 160; 2 Wait's Pr. 317.

49. What is the general rule of pleading in personal actions in respect to allegations of time?

It is a general rule of pleading in personal actions that the *time* of every traversable fact must be stated; or in other words, that every such fact must be alleged to have taken

place on some particular day. But the pleader will not be bound to prove at the trial that the event occurred at the time alleged. Gould's Pl. 79; Wait's Code, 295, *note d*; 2 Wait's Pr. 317.

50. When will it be sufficient to allege that one event was prior to another without specifying the date of either?

When the *order* in which events occurred is material only and the time of the occurrence of each is immaterial, it will be sufficient to allege that a specified event was prior or subsequent to another specified event. Wait's Code, 395, *note d*.

51. When is time material, and when must it be truly stated in a pleading?

In pleading any written document, as a record, bill of exchange, promissory note, etc., the day on which it is alleged to bear date is material and must be truly stated; for although the date forms no part of the *contract* it enters into the description of the *instrument* and is the chief test in determining its identity. Gould's Pl. 82; 2 Wait's Pr. 318.

52. What was the old rule in regard to allegations of place in pleadings?

It was formerly a general rule of pleading that the *place* of every *traversable* fact, stated in the pleadings, must be distinctly alleged; or, at least, that some certain place must be alleged for every such fact. Gould's Pl. 100.

53. When is it necessary to state the place at which an event occurred, in pleadings under the Code?

Only when the averment of place is actually a material issue, or where such averment is necessary as a description to identify some specified transaction. 2 Till. & S. Pr. 22; 2 Wait's Pr. 318.

54: When is an allegation of place material?

It is a general rule of pleading that, if the matters alleged are local in their nature, the allegation of place, and proof of it, is material and of the substance of the issue. Where a contract is sought to be enforced, which is void under the laws

of this State, but valid where made, the place where the contract was made must be alleged and proved. So where a vendor agrees to sell and deliver at a certain place, and the vendee agrees to receive and pay, an averment of readiness to perform at that place is indispensable, in an action for a breach of the agreement. So an averment of place may be material to show a right of action in a particular plaintiff, as, where a right of action is given to certain local officers for offenses committed within certain limits. Wait's Code, 296, *note f.*; Gould's Pl. 101, *note*; Stephens' Pl. 288; 2 Wait's Pr. 318.

55. What is the object of introducing an allegation of value in a pleading?

Allegations of value are introduced in pleadings in order that the pleadings may furnish a *prima facie* measure of damages. Allegations of this nature are not issuable. Wait's Code, 296, *note e.*; Gould's Pl. 173; 2 Wait's Pr. 387.

56. What degree of minuteness is required of the pleader in the statement of facts in a pleading?

Only that degree of minuteness is required in the statement of facts in a pleading as will clearly apprise the parties of the precise nature and extent of the charge or defense, and enable them to prepare for trial. 2 Till. & S. Pr. 23; 2 Wait's Pr. 319.

57. Are allegations of quantity essential in pleadings?

It is seldom necessary that allegations in regard to quantity be made or proved, except where the subject of averment is a record, a written instrument, or an express contract. Wait's Code, 295, *note b.*; Gould's Pl. 172, 173; 2 Wait's Pr. 319.

58. Give the reason why, in an action against an executor or administrator, the plaintiff is not required to allege the particulars relating to the appointment of such executor or administrator, while in an action by an executor or administrator such allegations are required.

The distinction results from the familiar rule of pleading, that, where the matters in controversy are better known to the

opposite party than to the pleader, less definiteness and certainty will be required. Stephens' Pl. 370; Gould's Pl. 171; Wait's Code, 297, *notes g, i*; 2 Wait's Pr. 320.

59. What is the remedy against a want of precision and particularity in a pleading?

The remedy is by motion to make the pleading more definite and certain under section 160 of the Code; 2 Wait's Pr. 486.

60. Is it necessary for a party to set forth, in a pleading, the items of an account upon which the cause of action or defense is founded?

It is not; but the adverse party may, by a demand in writing, require that a copy of the account be served upon him within ten days after such demand. If such account is not furnished within that time, the adverse party may obtain an order precluding the party pleading it from giving evidence concerning it on the trial. Wait's Code, 287, § 158; 2 Wait's Pr. 325.

61. What is the rule of the Code in relation to the pleadings in an action or defense founded upon an instrument for the payment of money only?

In an action or defense founded upon an instrument for the payment of money, it is sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims. Wait's Code, 301, § 162; 2 Wait's Pr. 327.

62. Is it necessary in an action upon a promissory note to set forth a copy of the note in the complaint?

It is not. It is discretionary with the pleader whether he will avail himself of the provisions of the statute, or whether he will allege all the facts upon which his right of action depends, as was required under the old system. Wait's Code, 301, *note a*; 2 Wait's Pr. 327.

63. In an action against the indorser of a promissory note, will it be sufficient to set forth a copy of the note and the indorsement thereon?

It is not. Indorsement alone gives no right of action.

against the indorser, his liability being dependent upon facts outside of the written instrument. These facts must be pleaded. Wait's Code, 302, *note d*; Edwards on Bills & Prom. Notes, 619; 2 Wait's Pr. 328.

64. *What facts must be alleged in a complaint in an action against an indorser of a bill or note?*

It is necessary to allege the making of the note or bill, describing it according to its legal effect or setting out a copy; that the defendant indorsed the same to the plaintiff or to a prior party through whom he derives title; that the same was duly presented to the maker or acceptor for payment when the same became due, and dishonored; and that the defendant was duly notified of the dishonor. Edwards on Bills & Prom. Notes, 674; Wait's Code, 202.

65. *Why is it sufficient to allege the pleader's conclusions that payment was "duly" demanded or notice "duly" given, when the rules of pleadings require that facts shall be stated and not conclusions of law?*

Because demand and notice are conditions precedent, and the Code has made the mode of alleging the performance of such conditions an exception to the general rule requiring facts to be alleged and not conclusions of law. Edwards on Bills & Prom. Notes, 674.

66. *How may performance of conditions precedent be pleaded under the Code?*

The Code provides that in pleading the performance of conditions precedent, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. Wait's Code, 300, § 162; 2 Wait's Pr. 326.

67. *How may the judgments of courts of special jurisdiction be pleaded?*

In pleading any determination of a court of limited jurisdiction, it is only necessary to allege that such judgment or

determination was duly given or made. If that be denied jurisdiction and all jurisdictional facts must be proved. Wait's Code, 400, § 161, *note a*; 2 Wait's Pr. 325.

68. What is it necessary to allege in pleading a foreign judgment?

In an action on a judgment of a foreign court of inferior jurisdiction the pleadings must set forth the facts showing the jurisdiction of the court over both the subject-matter and of the person. It must also aver either general jurisdiction in the court, or that its jurisdiction was such as to embrace the action in which the judgment in question was recovered, and also that the court had jurisdiction of the person of the defendant. Wait's Code, 300; 2 Wait's Pr. 326.

69. Is it necessary in pleading the determination of a court of general jurisdiction to allege jurisdictional facts?

It is not, as the jurisdiction of such courts will be presumed. 2 Till. & S. Pr. 29.

70. In an action for slander or libel, is it necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose?

It is not. It is sufficient to state, generally, that the defamatory matter was published or spoken concerning the plaintiff, and if this allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken. Wait's Code, 302, § 164; 2 Wait's Pr. 329.

71. Does this rule render all allegations of extrinsic facts unnecessary in a complaint in an action for slander or libel?

It does not. Section 164 of the Code merely dispenses with the allegation of extrinsic facts showing the application of the words to the plaintiff, but does not remove the necessity of an averment or inuendo where they are essential to show the meaning of the words themselves. Wait's Code, 214; 2 Wait's Pr. 329.

72. What defenses does the Code allow the defendant to set up in his answer in an action of slander or libel?

The Code provides that the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages ; and whether he prove the justification or not, he may give in evidence the mitigating circumstances. Wait's Code, 302, § 165.

73. How must the justification be pleaded?

If the charge which is alleged to be libelous was made in general terms, the answer must allege the *facts* which establish its truth, giving the time, place and circumstances of the offense of which the plaintiff is alleged to have been guilty. But if the defamatory matter was spoken or published in the form of a specific charge, it will be sufficient to allege, generally, that the charge is true. Wait's Code, 303.

74. What is the rule of the Code as to pleading title to land in an action to recover possession of property distrained, doing damage thereon?

In such action it will be a sufficient answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, without setting forth the title to such real property. Wait's Code, 305, § 166 ; 2 Wait's Pr. 329.

75. What is the rule of the Code in respect to the construction of pleadings?

In construing a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. Wait's Code, 289, § 159 ; 2 Wait's Pr. 333.

76. Where there are both general and specific statements of facts in the same pleading, and the latter statement evidently qualifies the former, which must control?

The specific statement of facts will control the general allegation ; and the general allegation must be construed in

connection with, and as qualified by the specific statement.
Wait's Code, 289, *note a*; 2 Wait's Pr. 331.

77. *Will the court construe a pleading with the same degree of strictness at the trial, and upon demurrer?*

It will not; much greater liberality will be exercised by the court in the construction of a pleading upon the trial, than when the same questions arise upon motion or demurrer. Wait's Code, 280, *note b*; 2 Wait's Pr. 333.

78. *Where a party uses equivocal or ambiguous terms in pleading, what rule of construction will be applied?*

The old common-law rule, that if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them; but this rule is subject to qualification, that when a matter is capable of receiving different meanings, that shall be taken which will support the pleading, and not the other which will defeat it. Wait's Code, 290, *note f*; 2 Wait's Pr. 334.

79. *Where a pleading contains an averment of a legal conclusion against a previously admitted fact, which must control?*

The fact is of the most importance, and must stand while the conclusion will be disregarded. Wait's Code, 290, *note i*; 2 Wait's Pr. 332.

80. *If a pleading contains more than one cause of action, or more than one defense, is it to be construed as a whole, or must each cause of action and each defense be taken separately?*

Each distinct cause of action or defense must be construed separately, as they each in fact form a separate pleading. 2 Till. & S. Pr. 30; 2 Wait's Pr. 332.

81. *When must a pleading be verified?*

When any pleading is verified every subsequent pleading, except a demurrer, must be verified also. Wait's Code, 280, § 156; 2 Wait's Pr. 335.

82. Does this rule render it necessary to verify an amended complaint where the original was unverified, and a verified answer has been served thereto?

It does not. The term "subsequent pleading" means subsequent in *legal order*, and not in point of time. Wait's Code, 281, note c.

83. What will be the effect of serving an unverified complaint, or one imperfectly verified?

The only effect of serving a complaint which is unverified or imperfectly verified, is to extend to the defendant the privilege of serving an unverified answer. Defects in verification will not affect the regularity of a complaint. Wait's Code, 280; 2 Wait's Pr. 335.

84. When may the verification be omitted?

1. Where the pleading is not an answer or reply to a prior verified pleading; 2. Where an admission of the truth of the allegation might subject the party to prosecution for felony; 3. Where the party called on to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleadings. Wait's Code, 281, § 157; Laws of 1854, ch. 75, § 1; 2 Wait's Pr. 335.

85. If there are several defendants in an action, and one of them would be privileged from testifying as a witness, will this render it unnecessary to verify the answer?

It will. Wait's Code, 282, note g; 2 Wait's Pr. 337.

86. Can a pleading be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading?

It cannot. Wait's Code, 281, § 157.

87. What course should a defendant pursue when an admission of the truth of an allegation might subject him to a prosecution for a felony?

He should deny the allegation and omit to verify his answer. If he declines to answer the allegation on the ground that his answer might subject him to a criminal prosecution,

he admits it for the purposes of the action. Wait's Code, 282, *b*; 2 Wait's Pr. 336.

88. State some of the actions in which the defendant need not verify his answer.

The defendant need not verify his answer in an action for libel, or assault and battery, or for divorce on the ground of adultery. 2 Till. & S. Pr. 34.

89. Is a partial verification necessary where a defendant is excused from verifying a part of the pleading?

It is not. Where a defendant is excused from verifying a part of the pleading he is excused from verifying the residue. Wait's Code, 282, note *g*; 2 Wait's Pr. 337.

90. Give the form of a verification to a pleading.

The verification of a pleading must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true. Wait's Code, 281, § 157; 2 Wait's Pr. 339.

91. By whom may a pleading be verified?

The pleading may be verified by the affidavit of the party; or, if there are several parties united in interest, and pleading together, by any one of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit; or it may be made by the agent or attorney if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in his possession, or if all the material allegations of the pleading be within his personal knowledge. Wait's Code, 281, § 157; 2 Wait's Pr. 338.

92. What are the requisites of a verification when made by any person other than the party?

In addition to what is required in a verification by a party, the person making the affidavit must set forth his knowledge, or the grounds of his belief on the subject, and the reason why the pleading is not verified by the party. Wait's Code, 281, § 157; Wait's Code, 283, notes *d, e*; 2 Wait's Pr. 341.

93. Who may verify the pleading where the party is not within the county in which the attorney resides?

In case of absence of the party, the attorney may verify the pleading, notwithstanding the foundation of the action or defense is not a written instrument in the possession of the attorney, and though all the material allegations of the pleading may not be within the personal knowledge of the attorney. Wait's Code, 282, note *a*; 2 Wait's Pr. 340.

94. Who may verify the pleadings where a corporation or the State is a party?

Where a corporation is a party, the verification may be made by any officer thereof; and when the State, or any officer in its behalf, is a party, the verification may be made by any person acquainted with the facts. Wait's Code, 281, § 157; Wait's Code, 383, note *b*; 2 Wait's Pr. 338, 342.

95. Who should verify a pleading where an infant is a party?

The pleading should be verified by the guardian *ad litem* of the infant. Wait's Code, 280, note *d*; 2 Wait's Pr. 342.

96. Where several parties not united in interest join in an action or defense, how should the pleadings be verified?

The pleadings should be verified by all the parties not united in interest. Wait's Code, 287; 2 Wait's Pr. 338.

97. What is the proper course for the attorney for the plaintiff to pursue if the defendant serves an unverified answer to a verified complaint?

The attorney should promptly return the pleading with a statement of the objection to its receipt, and if no verified answer is served within the time allowed for answering, should proceed to enter up judgment as if no answer had been served. Wait's Code, 280, note *c*; 2 Wait's Pr. 342.

98. What is a single cause of action?

The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Wait's Code, 183, note *a*; 2 Wait's Pr. 353, 451.

99. *What is the rule concerning splitting causes of action?*

It is a general rule that an entire and indivisible demand cannot be split up so as to form a basis of two actions; but where demands are separate and distinct, separate actions may be brought. Wait's Code, 183, note b; Wait's Code, 184, note d; 2 Wait's Pr. 355, 356.

100. *Where a single covenant is broken in more than one particular, can an action be brought for each separate breach?*

It cannot; but for each new breach a new action may be brought. Wait's Code, 184, note e; 2 Wait's Pr. 355.

101. *If a person gives two promissory notes, in payment for a certain piece of property, and fails to pay them at maturity, can his creditor bring separate actions thereon, or must he sue on both notes in the same action?*

He may maintain separate actions on the several notes. See Wait's Code, 184; 2 Wait's Pr. 356.

102. *What determines whether an action is brought ex contractu or ex delicto?*

The allegations of the complaint determine whether an action is brought on contract or in tort. Wait's Code, 182, note a.

103. *If you were employed to bring an action against an infant, would you bring the action in tort or on contract, if you were entitled to a choice of remedies?*

In tort, as the infant would not be liable on his contract, while infancy would be no defense to an action in tort. Wait's Code, 182, note e; 2 Wait's Pr. 358.

104. *If your client had, by means of false and fraudulent representations, been induced to part with the possession of property, and afterward, on discovering the fraud, had rescinded the contract and brought an action for the recovery of its possession, would you set forth, in your complaint, all the facts in regard to the transaction?*

No. It would be sufficient to set forth such facts as are

necessary to maintain the cause of action, and, if the special agreement is set up by way of defense, the facts of the transaction may be proved on the trial. Wait's Code, 182, *note g.*

105. What causes of action may be joined in the same complaint?

The plaintiff may unite in the same complaint several causes of action, whether legal or equitable, or both, where they all arise out of: 1. The same transaction, or transactions connected with the same subject of action; 2. Contract, express or implied; or, 3. Injuries, with or without force, to person and property, or either; or, 4. Injuries to character; or, 5. Claims to recover real property, with or without damages, for withholding thereof, and the rents and profits of the same; or, 6. Claims to recover personal property, with or without damages, for the withholding thereof; or, 7. Claims against a trustee, by virtue of a contract or by operation of law. But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. Wait's Code, 305, § 167; 2 Wait's Pr. 361.

106. Is it proper to join, in the same complaint, a claim against a defendant, in his individual capacity, with another against him in his representative capacity?

It is not. Wait's Code, 308, *note c*; see Gould's Pl. 203; 2 Wait's Pr. 366.

107. What would be the effect if a plaintiff should join in his complaint a cause of action that accrued to him personally, with one that accrued to him in the character of an executor?

There would be a misjoinder of actions, for which a demurrer would lie under subdivision 5 of section 144 of the Code. Wait's Code, 309, *note i.*

108. If several causes of action, all belonging to some one class of section 167, are stated as one claim, instead of being separately stated, as required by the Code, is the pleading thereby rendered subject to demurrer?

It is not. The error can be corrected by motion, but not by demurrer. Wait's Code, 306, *note a*; 2 Wait's Pr. 300.

109. Is it proper to join a cause of action for malicious prosecution with a cause of action for libel or slander?

It is, as they all are included under the general head of injuries to character. Wait's Code, 306, *note b*; 2 Wait's Pr. 365.

110. What does the Code require that the complaint shall contain?

The complaint must contain: 1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the action to be had, and the names of the parties to the action, plaintiff and defendant; 2. A plain, concise statement of the facts constituting a cause of action without unnecessary repetition; 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated. Wait's Code, § 142; 2 Wait's Pr. 369.

111. What will be the effect if the name of the court is not stated in the complaint?

If the name of the court is stated in the summons the complaint may be amended; but if it is omitted from both summons and complaint, no action has been commenced in any court, and consequently no court can entertain a motion to amend the complaint. Wait's Code, 185, *note a*; 2 Wait's Pr. 369.

112. What is the effect of omitting to name the place of trial in the complaint?

A complaint containing no venue is defective, and may be set aside on motion. An amendment will, however, be allowed on terms. Wait's Code, 185, *note b*; Gould's Pl. 135, *note*; 2 Wait's Pr. 370.

113. What is the proper manner of designating a person in a pleading who sues or is sued in a representative capacity, as, for example, executor or administrator?

The party so suing or sued should be designated in the pleading by his full name, with the words "as executor,"

etc., or "as administrator" added. The word "as" is indispensable to show that the claim is made by or against a person in a representative character, as the words "executor, etc.," following the name of the party, are mere *descriptio personæ*, and surplusage. Wait's Code, 186, note *g*; id. 185, note *a*; 2 Wait's Pr. 373.

114. If an infant sues by his guardian how shall that fact appear in the complaint?

The names of both infant and guardian should be inserted in the title of the cause, as "A B, an infant, by C D, his guardian," and the complaint should also allege in a traversable form the due appointment of such guardian. Wait's Code, 187, note *i*; 2 Wait's Pr. 375.

115. In cases of variance between the summons and complaint, either as to the names of the parties or the nature of the action, which must control, and what is the defendant's remedy?

In cases of variance betweeen the summons and complaint, the summons must control. The defendant's remedy is by motion to set aside the complaint for irregularity. Wait's Code, 189; 2 Wait's Pr. 371.

116. In case of variance between the summons and complaint, where the complaint is right but the summons is wrong, what is the proper course of the plaintiff to pursue?

The plaintiff should apply to the court for leave to amend the summons. The court may allow the plaintiff to amend the sumntons and retain the complaint on a motion to set aside the complaint for variance from the summons. Wait's Code, 189; 2 Wait's Pr. 371, 372.

117. State the allegations essential and peculiar to a good complaint by an executor or administrator suing as such?

The complaint should allege that letters testamentary or of administration were duly granted to the plaintiff by a surrogate of this State, naming the officer or specifying his county, and should state also the time when and the place where the letters were granted. The facts out of which the

right of action arose should be stated as they actually exist. Thus, promises made to the deceased should be pleaded as so made, and not as having been made to the plaintiff. Wait's Code, 186, *note g*; 2 Wait's Pr. 373, 374.

118. *What allegations showing capacity to sue are essential in a complaint in an action brought by a receiver?*

The complaint must contain a direct averment that the plaintiff was duly appointed receiver by an order of the court or a judge, specifying what court or judge, and must set out so much of the proceedings of the appointment that the court may see that the appointment was legal. Thus it should state the time and place of appointment, the giving and filing of security, and the entry of the plaintiff upon the duties of his office. Wait's Code, 188, *note p*; 2 Wait's Pr. 375.

119. *What allegations are peculiar to complaints by banks created under the general banking law?*

Banks created under the general banking law should recite the title of the act, and the date of its passage under which proceedings were had for its incorporation. This is required by 2 R. S. 459, § 13, and the requirement is retained by section 471 of the Code. Wait's Code, 188, *note o*.

120. *When is it necessary to allege a consideration in a complaint upon contract?*

In all actions upon a contract, whether implied or express, oral or written, the complaint must allege the existence of a consideration sufficient to sustain the contract, except where the nature of the contract is such as to raise a presumption of a consideration, in which case no consideration need be averred. Wait's Code, 227; 2 Wait's Pr. 379.

121. *When is it necessary to allege a demand or request?*

It is only necessary to allege a demand or request where such demand or request is essential to fix the defendant's liability. Wait's Code, 228; 2 Wait's Pr. 380, 381.

122. *Is there any difference between the allegations necessary in a complaint in an action upon a note payable on demand, and a complaint in an action on a note payable after demand?*

There is. In the former case it is not necessary to allege a demand, while in the latter it is. Wait's Code, 228; 2 Wait's Pr. 381.

123. *What is the rule as to pleading a demand in an action of trover?*

In an action for the detention of chattels, where the defendant came lawfully into possession, a demand before suit must be alleged; but where there is a wrongful taking and detention, no demand need be alleged or proved. Wait's Code, 228; 2 Wait's Pr. 390.

124. *State the general rule as to the necessity of averring notice in a complaint.*

It is a general rule that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the party pleading it, than of the adverse party, notice thereof should be averred. Wait's Code, 227; 2 Wait's Pr. 385.

125. *What is the rule as to the necessity of alleging the performance of conditions precedent?*

Whenever a condition precedent exists, its performance must be alleged or its non-performance excused. Wait's Code, 229; 2 Wait's Pr. 383.

126. *How must performance of conditions precedent be pleaded?*

It is optional with the pleader whether he will plead the performance of a condition precedent in the manner authorized by section 162 of the Code, or whether he will conform his pleading to the requirements of the old system. If he adopts the Code method, it will be unnecessary to state facts showing performance, but if he does not adopt that method, the former rules of pleading apply, and facts showing performance must be stated, not circumstances that are mere evidence, nor mere legal conclusions. Wait's Code, 229; 2 Wait's Pr. 384.

127. What facts may be alleged by way of excuse for the non-performance of a condition precedent?

Where non-performance has been occasioned by the act of God, or of the law; or where the other party has disqualifed himself for performing the condition on his part, or has given notice that he will not perform it, the party seeking a remedy need not aver performance or readiness to perform on his part, but may allege these facts in excuse of non-performance. Wait's Code, 229, 230.

128. When must damage be pleaded?

Such damage as must necessarily result from the facts set forth in a pleading need not be set forth in a complaint, but all other damage must be pleaded, or evidence of such damage cannot be given on the trial. Damage which must be pleaded, and which does not necessarily arise from the facts stated in the complaint, is commonly called special damage. 2 Till. & S. 101, 102; 2 Wait's Pr. 387, 388, 397.

129. When and how must special damage be pleaded in an action of slander?

In all actions of slander where the defamatory words spoken are not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and such special damage must be fully and accurately alleged. Thus, if the special damage consists in a loss of customers, or in the loss of a sale of property, the persons who ceased to be customers, or who refused to purchase must be named. Wait's Code, 215; 2 Wait's Pr. 398, 399.

130. What are the essential averments of a complaint in an action for slander of title to land?

1. A statement of the words spoken; 2. An averment of their falsity; 3. Malice in the speaker; and 4. Facts showing special damage. Wait's Code, 215.

131. What allegations are necessary in a complaint in an action for malicious prosecution?

The essential allegations of a complaint in an action for malicious prosecution are those showing a previous un-

founded prosecution of the plaintiff by the defendant, commenced without *probable cause*, conducted with *malice*, and terminated *favorably* to the party prosecuted. Wait's Code, 215.

132. *What are the essentials of a complaint in an action for deceit in the purchase or sale of a chattel, induced by false representations?*

The complaint should at least set out the substance of the representations, and aver their falsity, and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade in question, and that they did induce such trade to the defendant's injury. Wait's Code, 207, 208.

133. *What allegations must be contained in a complaint for goods sold and delivered?*

The complaint must show (1), a sale and delivery of the goods to the defendant; (2), their value; and (3), non-payment. Wait's Code, 209.

134. *What are the essential allegations of a complaint in an action to recover money loaned, or money paid to the defendant's use?*

A complaint, in an action to recover money loaned, should aver that the money was loaned to the defendant, and that it has not been repaid. A complaint, in an action for money paid, should allege the payment of money to the defendant's use, at his request, and that the same has not been repaid. Wait's Code, 220.

135. *What must be shown in a complaint in an action for use and occupation?*

The complaint must show (1) title in the plaintiff; (2) a use and occupation by the defendant; and (3) that such use and occupation was with the plaintiff's permission. Wait's Code, 225.

136. *What must be alleged in a complaint in an action on a breach of an express or implied contract of warranty?*

The complaint must allege, as material and traversable

facts: 1. The existence and terms of the warranty, whether express or implied; 2. A sale on the faith of the warranty; 3. The existence of a defect warranted against; and 4. Damages arising therefrom. Wait's Code, 207, 208.

137. Within what time must the defendant plead, after being served with a copy of the complaint?

The demurrer or answer of the defendant must be served within twenty days after the service of the copy of the complaint, unless the time for answering or demurring has been extended by order or by consent, or unless the defendant has been arrested in the action, or the complaint has been served by mail. Wait's Code, 232; 2 Wait's Pr. 410.

138. Within what time may the defendant answer the complaint in an action in which he has been arrested?

The defendant may answer the complaint at any time within twenty days from the service of the order of arrest. Wait's Code, 356, § 183; 2 Wait's Pr. 412.

139. Where the summons has been served by publication, when does the time to answer begin to run?

The defendant has twenty days, in which to appear and answer, after the expiration of the time prescribed in the order for the publication of the summons. Wait's Code, 178, § 137, notes; 2 Wait's Pr. 412.

140. Within what time may the defendant answer a complaint served by mail?

At any time within forty days from the date of such service. Wait's Code, 772, § 412; 2 Wait's Pr. 411.

141. What is the proper procedure, on the part of the attorney for the plaintiff, on receiving an answer or demurrer served after the defendant's time for pleading has expired?

The proper course for the plaintiff's attorney to pursue is to return the pleading forthwith, with a statement of the objections to its receipt. Wait's Code, 233, notes.

142. What is the effect of a failure to answer within the time fixed by statute?

If the defendant's time to plead has not been extended by

order or consent, a failure to plead within the time allowed by statute entitles the plaintiff to judgment. Wait's Code, 428, § 246; 2 Wait's Pr. 432, 518.

143. Within what time must the defendant serve an answer to an amended complaint?

An answer to an amended complaint must be served within twenty days from the service of the amended pleading upon the defendant. Wait's Code, 239, § 146; 2 Wait's Pr. 411.

144. How would you proceed to obtain an extension of time to answer?

The proper procedure to obtain an extension of time to answer, when such extension cannot be obtained by consent, is to prepare: 1. An affidavit, setting forth the reasons why an extension of time is necessary; 2. Also, an affidavit of merits, by the party, or proof that one has been filed, or an affidavit of the attorney or counsel retained to defend the action, "that, from the statement of the case in the action, made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof;" and the affidavit must state whether any extension of time to answer or demur has been granted by stipulation or order; 3. The motion should be made *ex parte* before a judge of the supreme court at chambers, or before a county judge of the county where the action is triable, or of the county where the attorney for the defendant resides; 4. Copies of the affidavits and order must be served on the plaintiff. Wait's Code, 232, 762, 776, 834; §§ 401, 405; Rule 30, Sup. Ct.; 2 Wait's Pr. 413.

145. State the six grounds of demurrer given by the Code?

The defendant may demur to the complaint, when it appears upon its face either: 1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or, 2. That the plaintiff has not legal capacity to sue; or, 3. That there is another action pending between the same parties for the same cause; or, 4. That there is a defect of parties plaintiff or defendant; or, 5. That several causes of

action have been improperly united ; or, 6. That the complaint does not state facts sufficient to constitute a cause of action Wait's Code, 234, § 144 ; see Gould's Pl. 35, *note* ; 2 Wait's Pr. 446.

146. *How far is a demurrer an admission of the facts stated in the pleading demurred to?*

A demurrer, so long as it continues upon the record, is an admission of the facts stated in the pleading, not only for the purposes of the argument, but as evidence upon the trial. Wait's Code, 234, *note b* ; Gould's Pl. 429 ; 2 Wait's Pr. 445.

147. *Is it proper to demur to a part of an entire cause of action?*

It is not. A demurrer must reach the whole of a cause of action. Wait's Code, 234, *note c* ; Id. 239, *note d* ; 2 Wait's Pr. 446.

148. *Would it be proper to demur to a complaint on the ground of a defect of parties, arising from a failure to join as plaintiffs or defendants, parties not mentioned in the complaint?*

It would not, as a demurrer is a proper remedy only where the defect appears upon the face of the complaint. Wait's Code, 235, *note i* ; 2 Wait's Pr. 449.

149. *If it appears upon the face of the complaint that too many parties have been made defendants, would it be proper to demur on the ground of a defect of parties?*

It would not, as such demurrer is proper only where there are too few and not where there are too many parties. But the parties improperly joined as defendants may demur under the sixth subdivision of section 144, on the ground that *as to them*, the complaint does not state facts sufficient to constitute a cause of action. Wait's Code, 237, *note e* ; Id. 238, *note a* ; 2 Wait's Pr. 449, 450.

150. *What does the Code require in respect to the form of a demurrer?*

The Code requires that the demurrer shall distinctly

specify the grounds of objection to the complaint, and provides that unless it does so, it may be disregarded. Wait's Code, § 145; 2 Wait's Pr. 453.

151. How may these grounds of objection to the complaint be specified?

The demurrer will sufficiently specify the grounds of objection to the complaint if it follows the language of the statute, except where more than one ground of objection is included in the general wording of the statute. Thus, if the court has no jurisdiction of the subject of the action, a statement to that effect will be sufficient, without showing wherein or for what reason the court is wanting in jurisdiction; but a demurrer, specifying as a ground of objection, that the court has no jurisdiction of the person of the defendant *or* the subject of the action, will be insufficient in not stating wherein the court lacks jurisdiction, as whether it is wanting in jurisdiction of the *person* or of the *subject of the action*, unless, indeed, the court has jurisdiction of neither. 2 Till. & S. 130; but see Wait's Code, 239, note *a*; 2 Wait's Pr. 453, 454.

152. If a demurrer states "that the complaint does not state facts sufficient to constitute a cause of action," can the question as to the want of parties, or the form of the action be raised upon the argument?

It cannot. The demurrer must specifically state the particular objection relied on, or it will fail to serve the purpose of a demurrer. Wait's Code, 239, notes; 2 Wait's Pr. 454.

153. What is proper mode of taking an objection to the complaint, where any of the defects exist for which a demurrer is allowed under section 144 of the Code, but where such defects are not apparent upon the face of the complaint?

The objections which might be taken by demurrer, if the defects were apparent on the face of the complaint, may be taken by answer where the defects are not so apparent. 2 Wait's Pr. 408.

154. What will be the effect if no such objection be taken either by demurrer or answer?

In that case the defendant will be deemed to have waived

such objections, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. Wait's Code, 240, § 148.

155. *Will omitting to demur waive the objection that the complaint does not state facts sufficient to constitute a cause of action?*

It will not. This objection may be raised at any stage of the action. Wait's Code, 241, note *i*; 1 Wait's Pr. 456.

156. *What other defect in a complaint is not waived by pleading to the merits?*

The want of jurisdiction. This defect is incurable, and is never waived, but may be raised whenever the parties are before the court. Wait's Code, 241, note *h*; 2 Wait's Pr. 456.

157. *What must an answer contain?*

The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief; 2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition. Wait's Code, 242, § 149; 2 Wait's Pr. 415.

158. *What is the distinction between a general and a specific denial?*

A general denial is a denial of all the allegations of the complaint taken together. A specific denial is a denial of one or of each allegation taken separately. Wait's Code, 243, *a*; 2 Wait's Pr. 419.

159. *Give the usual form of a general denial.*

Ordinarily, the words "the defendant denies each and every allegation of the complaint" are used to present a general denial. Wait's Code, 243, note *a*; 2 Wait's Pr. 419.

160. *May there be a general denial to a part of a complaint?*

There may be a general denial to a part of a complaint.

A denial "of each and every allegation of a complaint, except those parts therein admitted," is an example of such a denial. Wait's Code, 243, *note b*; 2 Wait's Pr. 420.

161. *Is it allowable to answer a part of a complaint only, leaving the remainder of the complaint unanswered?*

It is, if the answer is sufficient to constitute a defense or counter-claim to so much of the complaint as it professes to answer. But if it assumes to answer the whole cause of action, and, in fact, only answers part, it may be demurred to. Wait's Code, 242, *note c*; Id. 245, *note q*.

162. *When is a denial of knowledge, or information sufficient to form a belief, the only proper mode of answering a complaint?*

When the defendant is ignorant of the facts alleged and cannot safely deny, and is not bound to admit them, but must verify his answer. Wait's Code, 245, *note k*; 2 Wait's Pr. 424.

163. *When is a denial of knowledge, or information sufficient to form a belief, insufficient as an answer?*

When the facts alleged in the complaint, if true, must necessarily be known to the defendant, or must be deemed, as a matter of law, to be within his knowledge, or where the defendant possesses the means of informing himself of the truth of such facts. Wait's Code, 244, *note g*; 2 Wait's Pr. 423.

164. *Is an allegation in a complaint that, by reason of the facts stated, the plaintiff was damaged in a specified sum, a proper subject of denial?*

It is not. A defendant does not admit the amount of damages alleged by neglecting to deny it. Wait's Code, 246, *note d*; 2 Wait's Pr. 419.

165. *Would it be proper to deny the alleged value of property, in an action for the conversion of personal property?*

It would not, as the value of the property is not traversable matter, and must be proved, whether denied or not. Wait's Code, 246, *note c*; 2 Wait's Pr. 419.

166. *Is it necessary that the answer of the defendant should deny such material facts as are not directly and expressly averred?*

It is. Every fact impliedly averred in the complaint must be traversed by the answer, the same as if it were expressly averred, or it will stand admitted. Wait's Code, 246, note *i*; 2 Wait's Pr. 416.

167. *When are allegations of special damage traversable?*

Only when such special damages are the gist of the action. Wait's Code, 246, note *g*.

168. *Can a defense, which confesses and avoids the cause of action, be given in evidence under a general denial?*

It cannot. Wait's Code, 248, *a*.

169. *Give the general rule as to what may or may not be given in evidence under a general denial?*

No distinct affirmative defense can be given in evidence under a general denial. A party in such case is limited to a contradiction of the plaintiff's proof and to the disproval of his case. Wait's Code, 249, note *n*.

170. *What is new matter?*

New matter is that which admits the cause of action alleged in the complaint, yet constitutes a defense to the same. Matter which denies the essential allegations of a complaint, or states circumstances which, if testified to by competent witnesses, would disprove them, is not new matter. Wait's Code, 249; 2 Wait's Pr. 426.

171. *When is it necessary to insert a demand for relief in an answer?*

A demand for relief is never necessary in an answer, except where the defendant asks affirmative relief against the plaintiff. Wait's Code, 252, note *a*.

172. *What are the essentials of a good answer setting up the pendency of a prior action?*

The answer must show that there is another action pend-

ing between the same parties and for the same identical cause of action as that in which the answer is interposed. Wait's Code, 253. *Now, doing the job . . .*

173. *In an action for an absolute divorce, on the ground of adultery, can the defendant set up as an answer cruel and inhuman treatment, and the abandonment of the defendant by the plaintiff; or in an action for a limited divorce, can the defendant set up as a defense or counter-claim the adultery of the plaintiff?*

He cannot. A claim for an absolute and for a limited divorce cannot be tried in the same action. Wait's Code, 256.

174. *Would it be proper, in an action for an absolute divorce on the ground of adultery, to set up as a defense adultery on the part of the plaintiff?*

It would; as such an answer is not only a complete defense but also a ground for affirmative relief. Wait's Code, 256.

175. *Is it proper or allowable to set up a strictly equitable defense to a legal cause of action?*

It is. Wait's Code, 257.

176. *How should payment by check be pleaded?*

The answer should allege the giving of the check, and the fact that the plaintiff has negotiated it, or that it has been paid. Wait's Code, 257, note d.

177. *What are the essentials of a plea of tender?*

An answer of tender, before action, must aver that the defendant always has been and still is ready to pay the amount tendered. An answer of tender, after action commenced, must aver the amount tendered, which must be sufficient to pay the plaintiff's demand, together with the costs, to the time of tender. Wait's Code, 258, 259; 2 Wait's Pr. 587.

178. *How should the defense of usury be pleaded?*

A party alleging usury as a defense must distinctly aver every particular necessary to establish the usury charged, and

distinctly deny every supposable fact which, if true, would render the transaction lawful. Wait's Code, 259, *a*.

179. *Is there any restriction imposed by the Code in respect to the number of defenses which the defendant may interpose by answer to the plaintiff's claim?*

There are no such restrictions. The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they are legal or equitable, or both. Wait's Code, 262, § 150.

180. *What is the rule as to the mode of stating distinct defenses in an answer?*

Each distinct defense or counter-claim set forth by answer must not only be separately stated, but plainly numbered, and must refer to the cause of action which they are intended to answer, in such manner that they may be intelligibly distinguished. Wait's Code, 262, § 150; Rule 25, Sup. Ct.; *id.* 832.

181. *When only may the court compel a defendant to elect between two or more distinct defenses to the same cause of action?*

A defendant can be compelled to elect between defenses only, when they are so inconsistent with each other that from the nature of the case it is impossible that he can have two such defenses. Wait's Code, 272, *note g.*

182. *What do you understand by a counter-claim?*

A counter-claim is a demand, existing at the commencement of the suit, in favor of the defendant and against the plaintiff, which would be sufficient to sustain an independent or cross action between the parties. It includes the former defense of set-off and recoupment, and is, in fact, a cause of action against the plaintiff set up by the defendant in his answer, instead of in a complaint in an independent action. Wait's Code, 264; 5 Wait's Pr. 427.

183. *How many species of counter-claim are given by the Code?*

There are two species of counter-claims, one which may

be set up in any action whatever, and one which can be pleaded only in an action arising on contract. The counter-claim which may be interposed in any action must consist of a claim existing at the commencement of the action, and arising out of a cause of action which itself arises out of the transaction set forth in the complaint, as the foundation of the plaintiff's claim, or which is connected with the subject of the action. The counter-claim which may be interposed only in an action arising on contract must consist of a cause of action which also arises on contract, and existed at the commencement of the action. Wait's Code, 262, § 150; 2 Wait's Pr. 429.

184. How must the sufficiency of a counter-claim as an answer be determined?

The only mode of determining the sufficiency of an answer containing a counter-claim, is by the inquiry, whether or not the facts stated would constitute a cause of action on behalf of the defendant against the plaintiff if the plaintiff had not sued the defendant, and whether or not the cause of action so constituted would fall under one of the several causes of action defined by section 150 of the Code. Wait's Code, 265, note a; 2 Wait's Pr. 428.

185. Is a defendant compelled to set up any demand which he may have against the plaintiff, or waive his right to urge it against the plaintiff in a subsequent action?

He is not. He may elect whether he will set up his demand against the plaintiff by way of answer, or whether he will bring an independent action to enforce his claim. Wait's Code, 265, note a.

186. How should a counter-claim be pleaded?

The rules governing the mode of setting out a cause of action in a complaint are equally applicable to the mode of setting up a counter-claim in an answer. But the pleader should state that the demand is set up as a counter-claim, otherwise it will be taken as a defense merely. 2 Till. & S. Pr. 158, 159; 2 Wait's Pr. 431.

187. Can a defendant both answer and demur to a complaint containing several causes of action?

A defendant may demur to one or more of several causes of action and answer to the residue. But the defendant cannot answer and demur to the same cause of action, and if he does so, the plaintiff may obtain an order striking out the demurrer or the answer, or compelling the defendant to elect by which he will abide. Wait's Code, 273, § 151, and *notes*.

188. Within what time must the plaintiff demur or reply to the answer, where a demurrer or reply is necessary or proper?

In the absence of any order or consent extending the time to plead, the plaintiff must demur or reply to the answer within twenty days from the time of its service upon him, unless such service was by mail, in which case the plaintiff has forty days in which to plead. Wait's Code, 277, § 153; id. 772, § 412; 2 Wait's Pr. 439.

189. When only is a reply necessary?

A reply is necessary only where the answer contains new matter constituting a counter-claim, or where a reply to new matter, constituting a defense by way of avoidance, is required by the court. Wait's Code, 277; 2 Wait's Pr. 440.

190. When may the plaintiff demur to the answer?

The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defense; and he may demur to one or more of such defenses or counter-claims and reply to the rest. Wait's Code, 277, § 153; 2 Wait's Pr. 457.

191. What may the plaintiff plead in reply to the answer?

The plaintiff may deny, generally or specifically, each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer. Wait's Code, 277, § 153.

192. *Is an answer, consisting only of a general denial, demurrable?*

It is not. Wait's Code. 278, note a; 2 Wait's Pr. 457.

193. *What is the effect of an omission, on the part of the plaintiff, to demur or reply to new matter, constituting a counter-claim, within the time prescribed by law?*

The effect of a failure to reply or demur, in such cases, is to entitle the defendant, on a notice of not less than ten days, for such judgment as he is entitled to upon the statement of the counter-claim in the answer. Wait's Code, 279, § 154.

194. *What remedy has the defendant, in case the reply of the plaintiff to any defense set up by the answer is insufficient?*

The defendant may demur to the reply, stating the grounds therefor. Wait's Code, § 155; 2 Wait's Pr. 461.

195. *What allegations will be deemed controverted, without being denied by the adverse party?*

Allegations of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, will be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require. It is by this fiction that the Code dispenses with the numerous pleadings existing under the old system. Wait's Code, 311, § 168.

196. *What facts may be set up by a supplemental complaint, answer or reply?*

Facts material to the case (1) occurring after the former complaint, answer or reply, or (2) of which the party was ignorant when his former pleading was made; (3) the fact that a judgment or decree of a court of competent jurisdiction has been rendered since the commencement of the action, determining the matters in controversy therein; and (4) the death, marriage or other disability of a party. Wait's Code, 334, § 177; id. 139, § 121.

197. *Is a supplemental pleading a substitute for the original?*

As a general rule it is not, but on the other hand is an

addition to the original pleading. The court may, however, compel a party, applying for leave to file a supplemental pleading, to elect to substitute it in place of the previous one; but, unless it does so, both remain. Wait's Code, 335, notes *b, j*; 2 Wait's Pr. 472.

198. What is the rule as to the character of the matter which may be alleged in a supplemental pleading?

The matter alleged in a supplemental pleading must not be contradictory to, nor inconsistent with, the matter alleged in the first pleading. Wait's Code, 335, note *e*; 2 Wait's Pr. 471.

199. When only is leave to serve a supplemental complaint unnecessary?

When the object of the complaint is to revive an action. It is then a matter of right, and it is unnecessary and improper to move for leave to file a supplemental complaint. Wait's Code, 335, note *b*; id. 336, note *h*; 2 Wait's Pr. 469.

200. Should the answer to a supplemental complaint relate to the supplemental pleading only, or to the original and supplemental complaint taken together as one pleading?

It should relate to the supplemental complaint only, as the defendant is not permitted to answer the original complaint anew, or further, without special permission. Wait's Code, 335, note *c*; id. 336, note *g*.

201. What would be the rule if the plaintiff set up a new cause of action by the supplemental complaint?

There is no rule applicable to such cases, as it is not allowable to set up a new cause of action by a supplemental complaint. Wait's Code, 335, note *a*; 2 Wait's Pr. 471.

202. What must be the character of a proposed supplemental answer, in order to entitle the defendant to interpose it as a matter of right?

The proposed pleading must be true, and must contain a good defense. The defendant also should not be guilty of laches in making the application. Wait's Code, 337, notes *b, c*; 2 Wait's Pr. 470.

203. What is a sham answer?

A sham answer is one that is false, whether it be interposed in good faith or otherwise. Wait's Code, 273; 2 Wait's Pr. 488.

204. What is an irrelevant answer?

An irrelevant answer is one which has no substantial relation to the controversy between the parties to the suit. Wait's Code, 275, note a; 2 Wait's Pr. 478.

205. What remedy has the plaintiff against sham and irrelevant answers and defenses?

His remedy is to move the court to strike out the defense as sham or irrelevant, as the case may be. Wait's Code, 273, § 152; 2 Wait's Pr. 489.

206. Can an answer containing a general denial be struck out as sham?

It cannot. 2 Wait's Pr. 491.

207. Can a counter-claim be struck out as sham or irrelevant?

It cannot, as a counter-claim is not a defense. Wait's Code, 275, note b; 2 Wait's Pr. 489.

208. What is a frivolous answer?

It is an answer which, if true, does not constitute any defense to any material allegation of the complaint, and which is so plainly insufficient that the court can determine it, upon bare inspection, without argument. Wait's Code, 439, note c; 2 Wait's Pr. 493.

209. What is the remedy of the party upon whom a frivolous demurrer, answer, or reply has been served?

His remedy is to apply to a judge of the court upon a previous notice of five days, for judgment upon such demurrer, answer or reply. Wait's Code, 437, § 247; 2 Wait's Pr. 493.

210. Can an order for judgment be made by a judge at chambers?

It can. A judge at chambers has the same power as a

judge at special term. Wait's Code, 437, note *a*; 2 Wait's Pr. 494.

211. *What is the proper course for a party to pursue on being served with a notice of motion for judgment on a pleading, as frivolous?*

If the party deems his pleading sufficient, it would, of course, be proper to contest the motion; if, however, the sufficiency of the pleading is doubtful, the proper course would be to serve an amended pleading, if the time to plead has not expired. A pleading served before the hearing of the motion will be an answer to it. Wait's Code, 437, note *e*; 2 Wait's Pr. 496.

212. *What would be the effect on a motion for judgment on account of the frivolousness of an answer, if it should appear on the argument that the complaint did not state facts sufficient to constitute a cause of action?*

The motion would be denied irrespective of the insufficiency of the answer. Wait's Code, 437, note *i*; 2 Wait's Pr. 495.

213. *What motion papers are necessary on the application for judgment on a frivolous pleading?*

The motion should be made on the pleadings served. No affidavit is necessary. Wait's Code, 437, note *m*; 2 Wait's Pr. 495.

214. *If a complaint contains but a single cause of action, and an answer or demurrer thereto has been adjudged frivolous, in what manner does the plaintiff take judgment?*

He takes judgment in the same manner as if no answer or demurrer had been put in. Wait's Code, 438, note *a*; 2 Wait's Pr. 495.

215. *State the general rule as to when, or in what cases, the court will strike out a demurrer as frivolous?*

The court will strike out a demurrer as frivolous only where it clearly appears to have been taken for the mere purposes of delay, or where the objections raised by it are clearly untenable. Wait's Code, 440, note *e*; 2 Wait's Pr. 495.

216. When may a pleading be amended of course?

A pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had, (1) at any time within twenty days after it is served, or (2) at any time before the period for answering it expires; or (3) it can be so amended at any time within twenty days after the service of an answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purposes of delay; and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed. Wait's Code, 319, § 172; 2 Wait's Pr. 501.

217. If a party has served an irregular pleading, and the adverse party has served a notice of motion to set aside the pleading on the ground of such irregularity, will the service of an amended pleading, within the time allowed for amendments, of course, relieve the party so pleading from all liability for the costs of the motion?

It will not. The right to serve an amended pleading, of course, and *without costs*, is given only where the first pleadings put in are regular, and if the adverse party has served the proper papers to set aside the first pleading for irregularity, the party amending must pay the costs of the motion, although the irregularity has been corrected by an amendment made within the time allowed for amendments of course, under section 172 of the Code. Wait's Code, 319, note b.

218. State some of the changes that may be made in a pleading by an amendment as of course?

The plaintiff may change the place of trial, strike out a cause of action, or insert a new cause of action in his pleadings. So the defendant may strike out a defense or insert a new one in his answer. Wait's Code, 319, 320, note a; 2 Wait's Pr. 504.

219. Can a change of parties be effected by an amendment of course?

It cannot. Wait's Code, 320, b; 2 Wait's Pr. 504.

220. Can a pleading be amended the second time without leave of court?

It cannot, and the rule is the same whether the first amendment was by leave of court or not. Wait's Code, 321, *note i*; 2 Wait's Pr. 503.

221. If a demurrer is decided adversely to the party demurring, can the party plead over of course?

He cannot; but the court may, in its discretion, if it appears that the demurrer was interposed in good faith, allow the party to plead over on such terms as may be just.

222. If a defendant demur to a complaint on the ground that several causes of action have been improperly united, what amendment may be made to the complaint, upon the allowance of the demurrer?

The court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action mentioned in the complaint. Wait's Code, 319, § 172.

223. What is an amended pleading, and what is its relation to the original pleading?

An amended pleading is one that, in legal effect, is essentially different from the original pleading. A mere change in the form and phraseology of a pleading will not make it an amended pleading if in legal effect it amounts to the same thing. An amended pleading takes the place of the original, which ceases to exist for the purposes of the action. Wait's Code, 321, *note a*; 2 Wait's Pr. 505.

224. What amendments may be made by the court before or after judgment?

The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conform-

ing the pleading or proceeding to the facts proved., Wait's Code, 323, § 173; 2 Wait's Pr. 506.

225. *Can the court, before trial, allow an amendment to a pleading which will have the effect to change entirely the whole cause of action or the entire ground of defense?*

It can. It is only when a party seeks to amend his pleadings after trial, that the court is prohibited from allowing an amendment which would substantially change the cause of action or defense. Wait's Code, 324, note a; 2 Wait's Pr. 507.

226. *Is there any distinction made by the courts in respect to the allowance of amendments setting up defenses denominated unconscionable, as usury and the like, and amendments setting up any other defense whatever?*

There is not. It was formerly the universal practice of the courts to disallow amendments setting up the defense of usury ; but now no distinction is made between defenses, provided a proper case is made. Wait's Code, 324, note b; 2 Wait's Pr. 505.

227. *Can an amendment to the complaint be allowed at the trial, that will change the form of the action from an action ex delicto, to an action ex contractu?*

It cannot. Wait's Code, 324, 326, note a.

228. *Will the fact that there is an error or defect in a pleading be a ground for the reversal of a judgment rendered in the action, where such defect has not affected the rights of the defeated party?*

It will not. The court is required in every stage of the action to disregard any error or defect in the pleadings which does not affect the substantial rights of the adverse party. Wait's Code, 334, § 176.

229. *What pleadings are allowed in courts of justices of the peace?*

But two pleadings are allowed, the complaint by the plaintiff, and the answer by the defendant. Code, § 64.

230. What should these pleadings contain?

The complaint should state, in a plain and direct manner, the facts constituting the cause of action. The answer may contain a denial of the complaint, or of any part thereof, and also notice, in a plain and direct manner, of any facts constituting a defense or counter-claim. Code, § 64.

231. What are the provisions of the Code in respect to the form of pleadings in justices' courts?

The pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. Code, § 64.

232. In what cases may a demurrer be interposed in justices' courts?

Either party may demur to a pleading of his adversary, or any part thereof, (1) when it is not sufficiently explicit to enable him to understand it, or (2) when, although taken as true, it contains no cause of action or defense. Code, § 164.

233. What is the result if the demurrer is allowed?

If, in the opinion of the court, the objection raised by demurrer is well founded, the party will be required to amend the defective pleading, and if he refuses to do so the pleading will be disregarded. Code, § 164.

234. How may an account, or instrument for the payment of money only, be pleaded in a justices' court?

The Code provides that in an action or defense founded upon an account, or an instrument for the payment of money, it shall be sufficient for a party to deliver the account, or instrument to the court, and to state that there is due to him thereon from the adverse party, a specified sum which he claims to recover or set off. Code, § 64.

235. What is the rule in justices' courts, in respect to a variance between the proof on the trial, and the allegations in a pleading?

Such variances will be disregarded as immaterial, unless the adverse party has been misled to his prejudice thereby. Code, § 64.

236. *What is the effect of a variance between the complaint and summons?*

A complaint need not correspond literally with the summons, in setting forth the cause of action, and a variance in that respect will be disregarded. Wait's Code, 79, note *a*.

237. *When may pleadings be amended in justices' courts?*

Pleadings in justices' courts may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. Code, § 64.

238. *Is a supplemental answer allowable in justices' courts?*

It is allowable for the purpose of setting up such matters of defense as arise after the testimony is closed, but before the case is submitted. Wait's Code, 80, note *e*.

239. *Is a reply necessary or allowable as a pleading in justices' courts?*

It is not. New matter set up in the answer is deemed controverted without a reply; and facts to disprove such matter may be given in evidence without being pleaded. Wait's Code, 80, note *f*.

240. *How must all objections to a pleading in a justices' court be taken?*

By demurrer. Wait's Code, 80, note *a*.

241. *What is the effect of answering to the merits after a demurrer to the complaint has been overruled?*

It waives the demurrer. Wait's Code, 81, note *e*.

242. *When must an objection to a variance between the proof and the pleadings be taken?*

Upon the trial. Wait's Code, 81, note *b*.

243. *Can a justice allow a party to amend a pleading by striking out the name of a party?*

He cannot. Section 173 of the Code does not apply to justices' courts. Wait's Code, 81, note *d*.

CHAPTER XVIII.

PRACTICE.

1. What do you understand by the term "practice?"

Practice is the mode or form of conducting or carrying on actions or other judicial proceedings, according to the principles and regulations prescribed by law, or by the rules and decisions of the various courts. 1 Wait's Pr. 411.

2. How far has the Code abolished the old rules of practice?

The Code abolished the old rules and practice in the courts in civil actions, so far as they were inconsistent with that act, but retained and continued in force such as were consistent with that act, subject to the power of the respective courts to relax, modify or alter the same. Wait's Code, 802, § 469; 1 Wait's Pr. 442, 443.

3. Has the Code abolished the former statutory provisions relating to practice?

It has so far, and so far only, as they are inconsistent with its own provisions. It authorizes the adoption of the practice formerly in use in cases in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong cannot be had under the Code. Wait's Code, 802, § 468; 1 Wait's Pr. 442.

4. How are all remedies in courts of justice divided and classified by the Code?

They are divided into two classes: actions and special proceedings. Wait's Code, 7, § 11.

5. Define an action.

According to the Code, an action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement and protection of a right, the redress or prevention of a wrong, or the punishment of public offense. Code, § 2. An action is also defined as a judicial proceeding which, if conducted to a termination, will result in a *judgment*. Wait's Code, 18. See 1 Wait's Pr. 5.

6. What are all other remedies?

Special proceedings. Code, § 3.

7. Is a proceeding for the admeasurement of dower an action or a special proceeding?

It is an action. Wait's Code, 19, note j.

8. Is a summary proceeding by a landlord against a tenant, to recover the possession of demised premises, an action or a special proceeding?

It is a special proceeding. Wait's Code, 20, note l.

9. Give the Code division of actions, and the definition of each class.

Actions are either civil or criminal. A criminal action is an action prosecuted by the people of the State, as a party, against a person charged with a public offense, for the punishment thereof. Every other action is a civil action. Wait's Code, 20, §§ 5, 6.

10. Is the distinction between legal and equitable remedies continued under the Code?

It is not; at least the preamble of the Code declares that it is expedient that such distinction should no longer continue, and that a uniform course of proceeding, in all cases, should be established. See Wait's Code, 17; 1 Wait's Pr. 445.

11. What is the source or origin of all limitations as to the time of commencing actions?

All limitations upon the time of commencing actions are created by, and derive their authority from, statute. At common law there was no limit to the time within which an action must be brought. 1 Wait's Pr. 49.

12. What statute governs and limits the time within which an action must be commenced in this State?

The Code of Procedure, which repealed the former statute of limitations, and provided that all civil actions must be commenced within the periods it prescribed, except where, in special cases, a different limitation is prescribed by statute, or

where the right of action had accrued prior to its adoption. Wait's Code, 95, 97, §§ 73, 74; 1 Wait's Pr. 49.

13. *From what time does the time within which an action must be brought commence to run?*

It commences to run from the day on which the right of action accrues; that is, the day on which the right of action accrues is to be excluded, in computing the time within which an action may be commenced. 1 Wait's Pr. 49; Wait's Code, 95, note a.

14. *What effect has the absence of the defendant from the State on the time of commencing an action?*

If, when a cause of action accrues against a person, he is out of the State, the statute of limitations will not commence to run until his return into the State. So if, after a cause of action has accrued against a person, he departs from and resides out of the State, or remains continuously absent for the space of a year or more, the running of the statute is suspended during his absence. Wait's Code, 107, § 100; 1 Wait's Pr. 50.

15. *If a person, entitled to commence an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, is, at the time such title first descends or accrues, an infant, or insane or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life, within what time may such person commence such action, or make such entry or defense?*

At any time within ten years from the time when such disability ceased. Wait's Code, 102, § 88; 1 Wait's Pr. 50.

16. *What is the rule, where a person entitled to bring an action (other than for the recovery of the possession of real property, or for a penalty or forfeiture, or for an escape), is an infant, insane, or imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than life?*

In such cases the time of such disability is not reckoned as a part of the time limited for the commencement of the

action, except that the period within which the action must be brought cannot be extended more than five years, by any disability except infancy, nor can it be extended, in any case, longer than one year after the disability ceases. Wait's Code, 108, § 101.

17. If a party, entitled to bring an action, die before the expiration of the time limited for its commencement, and the cause of action survive, when may an action be commenced by his representatives ?

The action may be commenced by the representatives of the deceased, after the expiration of the time fixed by statute for the commencement of actions of that class, if within one year from the death of the party. Wait's Code, 108, § 102 ; 1 Wait's Pr. 51.

18. If a cause of action survive the death of a party who might have been made defendant, within what time may an action be brought against his executors or administrators ?

The action may be commenced at any time within one year from the issuing of letters testamentary or of administration, or within eighteen months from the expiration of the time fixed by the statute of limitations. Wait's Code, 108, § 102 ; 2 R. S. 448, § 8 ; 1 Wait's Pr. 51.

19. What effect has the existence of war between the countries, of which the parties to an action are citizens, upon the time within which such action must be commenced ?

It extends the time within which the action must be commenced. Thus, in suits by alien subjects of a country at war with the United States, the time of the continuance of the war is not to be computed as a part of the period limited for the commencement of such actions. The same rule applies to actions by citizens of a State engaged in war with the United States. Wait's Code, 109 ; 1 Wait's Pr. 53.

20. If the commencement of an action has been stayed by injunction or statutory prohibition until the time limited for its commencement has expired, will the person entitled to bring such action be thereby deprived of his remedy ?

He will not, as the time of the continuance of an injunc-

tion or prohibition forms no part of the time limited for the commencement of the action. 1 Wait's Pr. 52; Wait's Code, 109, § 105.

21. *If a person entitled to bring an action is of sound mind when the right of action accrues, but becomes insane before the time allowed for the commencement of the action has expired, can he, on being restored to reason, commence the action after the expiration of the time fixed by statute for the commencement of such actions?*

He cannot. No person can avail himself of a disability, unless it existed when his right of action accrues. Wait's Code, 109, § 106.

22. *When does the limitation attach when two or more disabilities co-exist at the time when the right of action accrues?*

In such cases the limitation does not attach until all the disabilities are removed. Wait's Code, 109, § 106.

23. *What actions, other than such as relate to real property, may be commenced within twenty years from the time when the right of action accrued?*

All actions upon judgments or decrees, or upon sealed instruments must be commenced within twenty years from the time when the cause of action accrued. Wait's Code, 103, § 90; 1 Wait's Pr. 55.

24. *What actions must be commenced within six years from the time when the cause of action accrued?*

1. Actions upon a contract, obligation or liability, express or implied, excepting such as arise upon a judgment or sealed instrument; 2. Actions upon a liability created by statute, other than for a penalty or a forfeiture; 3. Actions for trespass upon real property; 4. Actions of trover or replevin; 5. Actions for criminal conversation, or for any other injury to the person or rights of another, not arising on contract; 6. Actions for relief on the ground of fraud, in cases formerly cognizable by the court of chancery only. Wait's Code, 103, § 91; 1 Wait's Pr. 55-58.

25. When is a cause of action based on fraud deemed to have accrued?

A cause of action based on fraud is not deemed to have accrued until the discovery by the aggrieved party of the fact constituting the fraud. Wait's Code, 103; 1 Wait's Pr. 58.

26. Within what time must an action be brought upon a mutual, open and current account, where there have been reciprocal demands between the parties?

The cause of action is deemed to have accrued from the time of the last item proved in the account on either side, and the action must be brought within six years from that time. 1 Wait's Pr. 58; Wait's Code, 105, § 95.

27. Within what time must an action be brought against a sheriff, coroner or constable, upon a liability created by the doing of an act in virtue of his office, or by the omission of an official duty?

Actions against a sheriff, coroner or constable, as such, must be brought within three years, except the action be for an escape, in which case the action must be commenced within one year. 1 Wait's Pr. 59, 60.; Wait's Code, 104, 105, §§ 92, 94.

28. Within what time must an action upon a statute for a penalty or forfeiture be brought?

If the action is given by statute to the party aggrieved, or to such party and the people of the State, the action must be commenced within three years, except where the statute imposing the penalty or forfeiture prescribes a different limitation. If the penalty or forfeiture is given to the people, the action must be brought within two years. But where the penalty or forfeiture is given in whole or in part to any person who will prosecute for the same, the action must be commenced within one year after the commission of the offense; and if the action be not commenced within the year by a private party it may be commenced within two years thereafter in behalf of the people, by the attorney-general or the district attorney of the county where the offense was committed. 1 Wait's Pr. 60, 61; Wait's Code, 104, 105, §§ 92, 93, 96.

29. What actions other than for a penalty or forfeiture must be brought within two years?

All actions for libel, slander, assault, battery or false imprisonment must be brought within two years. 1 Wait's Pr. 60; Wait's Code, 105, § 93.

30. What are the requisites of an acknowledgment or new promise which shall be sufficient evidence of a new or continuing contract whereby to take a case out of the operation of the statute of limitations?

The acknowledgment or promise must be contained in some writing, signed by the party to be charged thereby, must be voluntary, unconditional, and made by the party or his authorized agent, to the creditor or some one acting in his behalf. 1 Wait's Pr. 63-65; Wait's Code, 110, § 110.

31. To what cases are the limitations prescribed by the Code not applicable?

The limitations prescribed by the Code are not applicable to actions to enforce the payment of bills, notes or other evidences of debt, issued by moneyed corporations or issued or put in circulation as money; nor to actions against directors or stockholders of moneyed corporations or banking associations to recover a penalty or forfeiture imposed or to enforce a liability created by law. Wait's Code, 109, 110, §§ 108, 109; 1 Wait's Pr. 66.

32. What is the rule as to the time of commencing a new action, where the original action was commenced within the prescribed time, but the judgment therein has been reversed on appeal?

In that case the plaintiff may commence a new action within one year after the reversal of the original action. The same rule applies to the heirs or representative of a deceased plaintiff if the cause of action survives. Wait's Code, 109, § 104.

33. Define a "court."

A court has been defined to be "a place wherein justice is judicially administered." 1 Shars. Bl. Com. 23.

34. In what sense is the term "place" in this definition to be understood?

It is to be understood figuratively ; for a court is properly composed of persons, consisting of the judge or judges, and other proper officers, united together in a civil organization, and invested by law with the requisite functions for the administration of justice. 1 Wait's Pr. 221.

35. What is the distinction between courts of record and courts not of record?

At common law, a court of record is one where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the court. Courts not of record comprise those inferior tribunals whose proceedings are not formally enrolled or recorded. 1 Shars. Bl. Com. 24.

36. What other general divisions of courts may be named?

Other general divisions embrace courts of common law and courts of equity ; courts of admiralty and maritime jurisdiction ; civil and criminal courts ; all of which possess some prominent features common to all, but are clearly distinguishable by features peculiar to each. 1 Wait's Pr. 222.

37. What are the three constituent parts, which are essential in every court?

First. The *actor*, or plaintiff, who complains of an injury done ; Second. The *reus*, or defendant, who is called upon to make satisfaction for it ; and Third. The *judex*, or judicial power, which is to examine the truth of the fact alleged, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and by its officers to apply the remedy. 1 Shars. Bl. Com. 25.

38. Name the different courts in this State.

1. The court for the trial of impeachments ; 2. The court of appeals ; 3. The supreme court ; 4. The circuit courts ; 5. The courts of oyer and terminer ; 6. The county courts ; 7. The courts of sessions ; 8. The courts of special sessions ; 9. The surrogates' courts ; 10. The courts of justices of the

peace; 11. The superior court of the city of New York; 12. The court of common pleas for the city and county of New York; 13. The mayors' courts of cities; 14. The recorders' courts of cities; 15. The marine court of the city of New York; 16. The justices' courts in the city of New York; 17. The justices' courts of cities; 18. The police courts. To these are to be added the city court of Brooklyn and the superior court of Buffalo. Wait's Code, 23.

39. What courts in this State, prior to the Code, corresponded with the English courts of common law?

The various courts of common pleas in the several counties of the State, the supreme court of the State, and the court for the correction of errors. The last named was the highest court of judicature in the State, and was exclusively a court of appeal and review. The former were courts of original jurisdiction, possessing also appellate jurisdiction from the decisions of the courts immediately below them. 1 Wait's Pr. 224.

40. When was the old court of chancery of this State abolished, and what court now has jurisdiction in equity?

The old court of chancery was finally abolished by the State constitution of 1846, and its power and jurisdiction were merged in that of the present supreme court of the State. No attempt was made, however, to blend the two systems of law and equity in practice until the adoption of the Code of Procedure of 1848. 1 Wait's Pr. 226, 445; see Const. 1846, art. 6, § 3; Const. 1869, art. 6, § 6.

41. From whence do the judges of courts derive their powers to act?

In England their authority is derived from the crown; in this country the sovereign people are the source of judicial power, and all our judges derive their authority from the will of the people, as expressed in the constitution, the acts of the legislature, and embodied in the law of the land. 1 Wait's Pr. 227.

42. What are some of the powers incident to all courts of record in this State?

Among these may be named the power to issue process of subpoena, to administer oaths to witnesses, to devise and make such new writs and forms of proceedings as may be necessary to carry into effect the powers and jurisdiction possessed by them, and to punish for contempts. 2 R. S. 276, 278.

43. What is meant by the "terms" and "vacations" of court?

The *terms* of the courts are those stated periods of the year in which courts sit for the dispatch of business. *Vacations* are the periods intervening between the terms. 1 Shars. Bl. Com. 275, 276.

44. What are "non-judicial" days?

They are those days during which no business is transacted by the courts, as Sunday or the legal holidays. The Revised Statutes of this State provide that "no court shall be opened or transact any business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury." 2 R. S. 275, § 7.

45. How may judges be removed from office in this State?

Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, two-thirds of all the members elected to each house concurring. Judges of other superior courts of record may be removed by the senate, on the recommendation of the governor, two-thirds of all the members elected to the senate concurring. Const., art. 6, § 11; 1 Wait's Pr. 231.

46. Are attorneys and counselors officers of the court?

They are; and when admitted, hold their offices for life, subject to removal or suspension for any deceit, malpractice or misdemeanor. Like other officers of the court, they are, by a legal fiction, always deemed to be, during term, present in court. 1 Wait's Pr. 234.

47. Is it necessary that the appointment or retainer of an attorney should be in writing?

It is not ; though in most cases advisable, being better for the attorney, because he avoids all difficulty in proving his retainer ; and it is better for many clients, as it puts them on their guard and prevents them from being drawn into law-suits without their own express direction. 1 Wait's Pr. 239.

48. Would it be regular to serve papers on a party when he has an attorney in the action ?

It would not. The service of papers should be made upon the attorney, and if made upon the party, would, in most cases, be deemed such an irregularity as to render the service of no effect. 1 Wait's Pr. 240 ; Wait's Code, 773.

49. To what punishments do attorneys subject themselves for misconduct in office ?

To removal from office, fine and imprisonment ; besides being liable for damages at the suit of the party aggrieved. In minor cases of misconduct the court will generally be satisfied with making the attorney pay the costs incurred by the parties by reason of such misconduct. 2 R. S. 287, 288 ; 1 Wait's Pr. 244.

50. May an action be sustained against an attorney by an adverse party, for matter spoken by the former, in maintaining an action, or in defense of a client ?

If an attorney maliciously invents and mentions an untruth, not pertinent to the cause, he may be liable to an action at suit of the party injured ; but the law does not hold him answerable for any matter spoken by him pertinent to the case in hand, and suggested in the client's instructions, although it should reflect upon another, and even prove absolutely groundless. 3 Broom & Had. Com. 25.

51. Can an attorney maintain an action for the recovery of his fees ?

At common law he cannot, but the rule has never been recognized in this State. He is here entitled to recover a reasonable compensation for his services. 1 Wait's Pr. 245.

52. What is the measure of the attorney's compensation for his services, under the Code?

Under the Code the measure of compensation is wholly left to the agreement, express or implied, of the parties. In the absence of an express agreement between the attorney and client, he is entitled to such compensation as his services are reasonably worth. 1 Wait's Pr. 246; Wait's Code, 583.

53. Has the attorney's lien for his costs been affected by the Code?

It has not, and it still exists as formerly. This lien attaches upon all deeds and papers in his hands belonging to his client; also, on the fruits of a judgment or decree obtained through his services. 1 Wait's Pr. 247.

54. In what cases will the name of an attorney be stricken from the roll?

In cases of gross misconduct in office. Thus, where it satisfactorily appears that no reliance can be placed upon the word or oath of an attorney, he is manifestly disqualified for the office; and it is the duty of the court to strike the name of the party from the roll of attorneys. 1 Wait's Pr. 249.

55. Name some of the other officers of a court of justice?

They are sheriffs, clerks, reporters, stenographers and criers, some of whom are elective officers, and others are appointed. 1 Wait's Pr. 249-256.

56. What is the present organization of the court of appeals of this State?

This court, as at present organized, is composed of a chief judge and six associate judges, chosen by the electors of the State for the term of fourteen years, from and including the first day of January next after their election. Five members of the court are sufficient to constitute a quorum, and the concurrence of four is necessary to a decision. Const. 1869, art. 6, § 2.

57. What is the present organization of the supreme court?

It is composed of thirty-three justices, elected by the people of the respective districts for the term of fourteen years,

four being elected in each district, except that composed of the city of New York, which elects five. No justice is allowed to sit as such longer than until and including the last day of December next, after he shall be seventy years of age. Const., art. 6, § 13.

58. What compensation do justices of the supreme court receive?

They receive, as compensation, the sum of \$6,000 annually, and an allowance of \$5.00 per day for their expenses when absent from their homes and engaged in the duties of their office. They can receive no fees or other perquisites of office, nor can they practice as attorney or counsel in any court of record in the State or act as referee. 1 Wait's Pr. 294.

59. What jurisdiction has the supreme court at present?

It has general jurisdiction, both at law and in equity, and, being a superior court, it will be presumed to have jurisdiction until the contrary appears. 1 Wait's Pr. 296.

60. How many judges must concur at general term, in order to pronounce a judgment?

The concurrence of a majority is necessary, and, if a majority do not concur, the case shall be reheard. Wait's Code, 44.

61. Designate the terms held by the supreme court?

The State is at present divided into four departments, and general terms are held in each department annually, viz.: Six in the first department, five in the second, eight in the third, and eight in the fourth departments. One special term at least is held in each county annually, but the judges of each district may appoint others. Two terms at least of the circuit court and court of *oyer and terminer* are held annually in each of the counties of the State. Wait's Code, 45; 1 Wait's Pr. 316-318.

62. By whom and how are the justices of the supreme court designated to hold general terms?

By statutory provisions, the governor is authorized to designate, from the whole bench of the supreme court, a presiding

justice and two associate justices from each department, to hold the general terms therein, and to designate justices to fill vacancies. When thus designated, the presiding justice acts as such during his official term, and the associate justices for five years from the 31st day of December next after the time of his designation. Laws of 1870, ch. 408.

63. How are the justices designated to hold special terms?

Any justice of the supreme court may hold special terms, and it is made the duty of the governor, whenever the public interest requires it, to designate one or more judges of the superior court or court of common pleas of the city of New York to hold special terms of the supreme court in that city. The governor may also appoint extraordinary general and special terms, whenever, in his judgment, the public good requires it. Const., art. 6, § 7; Laws of 1870, ch. 408, § 14; Wait's Code, 46.

64. What jurisdiction do county courts have at present, in this State?

They now have original jurisdiction in all cases where the defendants reside in the county, and in which the damages claimed shall not exceed \$1,000. Also, the exclusive power to review, in the first instance, a judgment rendered in a civil action by a justice's court in the county, or by a justice's court in cities, and to affirm, reverse or modify such judgment.
1 Wait's Pr. 389; Wait's Code, 50, 694, 695.

65. In what cases are judges disqualified from sitting as such?

Relationship to either of the parties to an action disqualifies a judge from sitting as such. So will an interest in the cause of action, or if he is a party to the action. If he decided the cause in the court below, or took part in the decision, he cannot sit in the appellate court, in review of such decision.
1 Wait's Pr. 46.

66. What is the distinction between superior and inferior courts?

Those courts which have general jurisdiction in law or
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equity cases are usually termed *superior* courts; while those which have but a limited jurisdiction as to subject-matter, locality or persons, are called *inferior* courts. A court of general or superior jurisdiction is presumed to have acted within its jurisdiction, and this presumption continues until the contrary is shown. Limited or inferior courts have no jurisdiction except that specially conferred, or such incidental powers as may be included in the general delegation of the authority. 1 Wait's Pr. 44; 2 Wait's Law & Pr. 21.

67. When is the jurisdiction of courts exclusive, and when concurrent?

The jurisdiction of any court is *exclusive*, when no other court can exercise the same powers in relation to the action. The jurisdiction of courts is *concurrent*, when each of several different courts has the same right to act in relation to its subject-matter, or as to the persons of the parties. 1 Wait's Pr. 44.

68. Will consent of parties confer jurisdiction over the subject-matter of actions, where none is given by law?

It will not, even though there should be an express agreement not to raise the question; and the objection may be interposed at any time, since in that case there can be no waiver of it; but the judgment will be held entirely void at all times and in all places. 1 Wait's Pr. 45; Wait's Code, 24, 25, 26.

69. How may a court gain jurisdiction over the person, where none is given by law?

A defendant may waive an irregularity in the mode of bringing him into court, or he may appear and give jurisdiction over his person by consent. Such waiver may be express, or it may be implied from his acts, by taking subsequent steps in the action without objection to the previous irregular or void proceedings. When once waived, the jurisdiction of the court over his person will be complete. 1 Wait's Pr. 46, 47.

70. How were civil actions commenced in the courts of record of this State, prior to the adoption of the Code?

They were commenced either by summons, by writ (*capias*

ad respondendum), or by declaration. The summons was used in actions against corporations only ; the *capias*, in actions against persons not privileged from arrest ; and the declaration in nearly all actions where no bail was required. Burr. Pr. 86.

71. What are the only modes by which an action can be commenced under the Code ?

The Code abrogated the old forms of procedure, and provided that all civil actions in the courts of record of this State shall be commenced by the issuing and service of a summons, by the voluntary general appearance of the defendant, or by the submission of a case upon which a controversy depends to a court for a final determination. Wait's Code, 157, 180, 722 ; 1 Wait's Pr. 467.

72. What is the office or object of a summons ?

It is to give the defendant certain and authentic notice, that an action has been commenced against him ; to apprise him of the nature and amount of the claims of the plaintiff ; and to compel his appearance in court, at answer to these demands, within a time stated, under penalty of forfeiting all subsequent right to dispute their validity, or to prevent their enforcement. 1 Wait's Pr. 468.

73. Does the Code require that the summons shall contain a title ?

It does not ; but by the uniform practice of the courts, a title is essential to the regularity of every summons, and indispensable where the summons and complaint are served separately. 1 Wait's Pr. 468.

74. What does the title of the summons include ?

It includes the name of the court, the place of trial, and the names of the parties, plaintiff and defendant. Where the summons and complaint are served together, an omission of the name of the court in the former will be disregarded, if it is named in the latter. 1 Wait's Pr. 468.

75. In specifying the place of trial in a summons, is it required to name the State?

It is not; the name of the county only need be given.
Cook v. Kelsey, 19 N. Y. (5 Smith) 412.

76. What is the rule, as regards, the inserting of the names of the parties in the summons?

It is essential that the full true name of all the parties, plaintiff or defendant, should be given. By the true name is meant the christian name given the party in baptism and the surname of his ancestor. 1 Wait's Pr. 469.

77. Is it necessary to give the middle name of parties?

It is not; nor is it necessary to give the distinguishing words "Senior" or "Junior," as these words form no part of the name. There are but two names, the christian and surname, by which a party is known to the law. 1 Wait's Pr. 469.

78. What is the rule as to the name of a party in a summons, where he is known by two names?

He may be sued by either. So where the true name of the party has been long abandoned and another assumed by which he is commonly known, the action may be brought in the assumed name. It is not allowable to commence an action in the maiden name of a married female. 1 Wait's Pr. 169.

79. If a plaintiff describes himself in the summons as suing in a representative capacity, can he, by any averments in the complaint, maintain an action for a claim due to him individually?

He cannot. So, if he commences his action as an individual, he cannot afterward change the character in which he sues, and recover for a claim held by him in a representative capacity. 1 Wait's Pr. 470.

80. If a plaintiff desires to sue in a representative character, how should it be indicated in the summons?

By inserting the word "as" between the name of the party and his descriptive title. Thus, to say "A B, administrator of," etc., would not entitle A B to prove a claim

upon the trial, accruing to him in his representative capacity. The proper form is "A B, *as administrator*," etc. 1 Till. & S. Pr. 365.

81. Suppose the plaintiff is ignorant of the true name of the party defendant, how may he sue?

In such cases the Code authorizes him to substitute any fictitious name for the name of the defendant, and, on the discovery of the true name, to amend the summons accordingly. There should be inserted with the fictitious name some description by which the unknown party may be identified. Wait's Code, 333.

82. By whom is the summons required to be subscribed?

Formerly a summons might be subscribed either by the plaintiff or by his attorney, but now it must in all cases be subscribed by the attorney ; and by attorney must be understood, not a mere agent, but an attorney at law. Wait's Code, 157, 159.

83. Is it necessary that the subscription should be written?

It is not. If the name of the attorney is printed upon the summons, the signature will be sufficient within the requirements of the Code. His place of business must be added to the attorney's name, and, if not so added, papers may be served on him, at his place of residence, through the mail. 1 Wait's Pr. 472.

84. What remedy, under the Code, is given to a defendant against a misnomer?

The only mode of presenting such a defense, under the present practice, is by answer. The objection to the defect in the summons having been properly set forth in the answer, the court may, on the trial, order the proper amendment. Wait's Code, 323.

85. In what cases is it proper to insert in the summons a notice of judgment for a specified sum?

Such notice is proper in all cases in which the plaintiff is entitled to recover a particular sum which is specified in express

terms in the contract ; or where such sum may be ascertained from the language and terms employed in the contract ; or where the law authorizes the recovery of a fixed sum, and it treats the recovery as one founded upon contract, although there may be no actual contract. 1 Wait's Pr. 475 ; Wait's Code, 160.

86. In what actions should the notice of judgment in the summons be for relief ?

In all actions for the recovery of damages for torts, or wrongs unconnected with contract, or actions for the breach of any contract, whether verbal or written, sealed or unsealed, expressed or implied, where the amount of damages is not fixed by the contract, but is unliquidated, and is to be established by evidence ; or where the relief sought is of an equitable nature ; or where the action is for the recovery of real or personal property ; and generally in all actions not brought for the recovery of a money demand *only*. Wait's Code, 160 ; 1 Till. & S. Pr. 368.

87. What must the summons contain besides the notice of judgment ?

It must in all cases require the defendant to answer the complaint, and to serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the State in which there is a post-office, and within twenty days after the service of the summons, exclusive of the day of service. Wait's Code, 157, 158.

88. Where there is a variance between the summons and complaint, which of the two controls ?

In such case the summons controls, and the complaint must be amended, to conform thereto, or it may be set aside for irregularity. It is too late, however, to object to such an irregularity on the trial of the cause. 1 Wait's Pr. 480.

89. What indorsement is required to be made on the summons, in an action for a penalty or forfeiture given by a statute ?

In such an action an indorsement must be made on the summons, referring in general terms to that statute, either by

citing the title of the act or by referring to the chapter of the session laws where it may be found, giving, at the same time, the day and year of its passage, or by any other method of citation, which shall clearly apprise the defendant of the particular statute under which the action is brought. 2 R. S. 481, § 7.

90. When is the summons said to be "issued?"

A summons is "*issued*" when it is made out and placed in the hands of a person authorized to serve it, and with the *bona fide* intent to have it served if practicable. 1 Wait's Pr. 484.

91. How may you obtain an amendment of the summons?

A summons can be amended only upon leave of the court; but it is a general rule that mere errors in form can be amended on application to the court, and on such terms as are just. Jurisdictional defects cannot be cured by amendment. Neither can the court allow any amendment which will substantially change the nature of the plaintiff's claim. 1 Wait's Pr. 490; Wait's Code, 323.

92. When is it proper to serve with the summons a notice of no personal claim?

The notice of no personal claim is proper wherever no reasonable defense can be interposed to the demands of the plaintiff, and where no rights or interests of the defendant would be invaded or jeopardized by the allowance of such demands. In no case can it be made a means of perpetrating a fraud, because whenever it appears that a plaintiff seeks, under this notice, to deprive a defendant of a substantial right, the courts will declare all such proceedings void *ab initio*. 1 Wait's Pr. 492.

93. What should the notice of no personal claim set forth, and by whom must it be subscribed?

It should set forth the general object of the action, giving a brief description of the property affected by it, if it affects specific real or personal property, and should notify the de-

fendant that no personal claim is made against him. It must be subscribed by the plaintiff or his attorney. Wait's Code, 162.

94. *What is the nature of a notice of lis pendens, and in what actions or cases is it proper to be filed?*

In actions affecting the title to real estate, the plaintiff may secure a lien on the property which is the subject of litigation, by filing with the clerk of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property affected thereby. This notice is also proper whenever, under the provision of the Code, included between sections 227 and 244, a warrant of attachment has been issued, if the same is intended to affect real estate. In actions for the foreclosure of mortgages, the filing of this notice is an indispensable prerequisite to the obtaining of a judgment. Wait's Code, 163; 1 Wait's Pr. 494.

95. *By whom may the service of the summons be made?*

The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. Wait's Code, 165.

96. *In what cases should service of the summons be made by the coroner?*

In an action of replevin brought by or against the sheriff of any county, or whenever the sheriff of any county is a party in any suit, the service of the summons, and all process in the suit, must be made by the coroner. Wait's Code, 774; 1 Wait's Pr. 508.

97. *What is the general rule as to the time of serving a summons?*

It is a general rule that a summons may be served on any day, or at any hour of the day or night; but to this rule there are several statutory exceptions. Thus, the service of a summons on Sunday is utterly void, and subjects the party making the service to damages at the suit of the party aggrieved. 1 Wait's Pr. 509.

98. What is the general rule as to the place of service?

With the exception of the cases specified in section 135 of the Code, the service of a summons must be made within the territorial jurisdiction of the court from which it issues. 1 Wait's Pr. 510.

99. Where it is sought to bring an action against persons, what is the mode of personal service of the summons?

It is made by delivering a copy of the summons to the defendant, and leaving it with him. If he refuses to receive or retain the copy thus presented to him, the party making the service should, notwithstanding, leave it with him, at the same time informing him of its contents, and of his right to retain the copy tendered him. 1 Wait's Pr. 511.

100. Is a personal service valid, which has been procured through fraud?

As a general rule, it is not. Thus, where a defendant has been brought within the jurisdiction of the court by means of fraudulent representations, for the purpose of making personal service of a summons upon him, the court will set aside the service. 1 Wait's Pr. 511.

101. How is service of the summons made on corporations?

By delivering a copy to the president, secretary, cashier, treasurer, a director, or managing agent of the corporation; but such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose therein, or where personal service is made within the State, upon the president, treasurer or secretary. Wait's Code, 165, 166.

102. How are minors served with summons?

If under fourteen years of age, by delivering a copy of the summons to the minor personally, and also to his father, mother or guardian, or, if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. If the minor be fourteen years old or upward, service may be made by delivering the copy of the summons

to him personally, in the same manner as if he were an adult. Wait's Code, 165.

103. If a person is imprisoned, how may he be served with summons?

In such case, the summons must be served on him personally in the place of his confinement; for, although the right of prosecuting an action is denied to such persons, the liability to be sued still exists. 1 Wait's Pr. 515.

104. How should service of the summons be made on States, counties, towns, etc.?

In an action against a State, the summons should be served on the governor, or chief executive magistrate, and on the attorney-general of the State. In actions against a county, or the board of supervisors of a county, the service should be made on the chairman or clerk of the board. In an action against a town, the summons should be served on the supervisor of the town. Service may be made on a city by serving a summons on its mayor. 1 Wait's Pr. 514, 515.

105. In what cases may a summons be served by publication?

1. Where the defendant is a foreign corporation, has property within the State, or the cause of action arose therein; 2. Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; 3. Where he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action; 4. Where the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein; 5. Where the action is for divorce, in the cases prescribed by law. Wait's Code, 170-172.

106. To whom, and how must application be made for an order for the service of a summons by publication?

Application must be made to the court, or a judge

thereof, or to a county judge of the county where the trial is to be had, by affidavit, and by affidavit only ; and the applicant must show that the case falls within some one of the subdivisions above mentioned, and establish the fact that the person on whom the service of the summons is to be made cannot, after due diligence, be found in the State. Wait's Code, 170-172 ; 1 Wait's Pr. 518, 519.

107. In what cases is substituted service of the summons authorized ?

This is a statutory equivalent for the personal service of a summons, and is applicable only to cases where the defendant cannot be found either in or out of the State, or where, being found, he avoids or evades service. 1 Wait's Pr. 532.

108. What are the essential facts to be established by affidavit, on application for an order for substituted service ?

1. That the defendant is a resident of this State ; 2. That proper and diligent effort has been made to serve a summons on him, without avail ; 3. That he cannot be found either in or out of this State, or, if found, that he evades or avoids personal service ; 4. That he is not an officer, soldier or musician in the army, or a sailor or marine in the navy, of the United States ; or, if defendant is so employed, that the action is for the partition of real estate, or that no personal claim is made against him. 1 Wait's Pr. 532, 533.

109. When is the service of the summons by publication deemed complete ?

It is deemed complete at the expiration of the time prescribed by the order for publication. If the time prescribed by the order is six weeks, the service is not complete until the expiration of the full time, or forty-two days. The defendant's time for answering does not expire until the lapse of twenty days thereafter. 1 Wait's Pr. 538 ; Wait's Code, 170.

110. In case of personal service, when is the service complete ?

Personal service, if made within the State, is complete at the time of the delivery of a copy of the summons to the party

served. This rule does not, however, apply to personal service out of the State. By the language of the Code, personal service out of the State is made, not a substitute for personal service within the State, but one equivalent to publication and deposit in the post-office. It can have no greater effect than such service, and must be subject to the same restrictions. Wait's Code, 170; 1 Wait's Pr. 539.

111. Does the allowance of a provisional remedy in any way affect or dispense with the service of a summons?

It does not. The summons must invariably be served before the action can be carried to a final determination. 1 Wait's Pr. 539.

112. What remedy has the defendant against an irregular, defective or fraudulent service of the summons?

His remedy is by motion to have the service of the summons and all subsequent proceedings set aside. As a general rule, all motions for relief, on the ground of irregularity, must be made before judgment; but where the defect is one of substance, and deprives the court of jurisdiction, no delay on the part of the defendant to object to such defect will deprive him of his right to have the service of the summons and all subsequent proceedings set aside as void. 1 Wait's Pr. 540, 541.

113. What constitutes a fraudulent service of a summons?

Fraudulent service is such as may, in form, be within the letter of the statute or the rules of law, and yet be in violation of the spirit and intent, and with the preconceived design of evading such legal provisions. Thus, where a party is induced to come within the jurisdiction of the court by false and fraudulent representations, for the sole purpose of effecting the service of a summons upon him, such service is in every respect fraudulent, although the wrongful act of service is in the usual mode. 1 Wait's Pr. 540.

114. Is such fraudulent service absolutely void?

It is not; for the court will acquire jurisdiction by the service of the summons, unless the defendant resorts to his mo-

tion to set aside the same. By a *void* service of process a court can acquire no jurisdiction of the person of the defendant. 1 Wait's Pr. 540.

115. How may proof of the service of the summons be made?

Such proof may be made either by the certificate of the sheriff, by affidavit or by admission. Wait's Code, 178, 179.

116. Upon what does the sufficiency of the evidence of a sheriff's certificate, as a proof of the service of a summons, depend?

It depends upon the capacity in which such service was made. A sheriff can act in an official character only within the limits of the county in which he was elected, and all acts performed by him beyond such territorial limits are the acts of a private person, and must be proved as such. 1 Wait's Pr. 542.

117. Is the certificate of a sheriff of the service of a summons within his own county conclusive evidence of the fact of such service?

It is, as against all persons but the defendant. It may, however, be impeached by the defendant, and when so assailed must be sustained by affidavit. In general, a sheriff's certificate is valid and conclusive in all matters where such return is required by law, but no further; and, for this reason, an indorsement on a summons setting forth the time of its receipt is not evidence of the time of the commencement of an action under section 99 of the Code. 1 Wait's Pr. 542.

118. Where the service of a summons has been made by any person other than a sheriff, how must the fact be shown?

It must be shown by the affidavit of the person making the service, or by the written admission of the party served. This rule is also applicable to a service made by a sheriff out of his county, or to the act of any officer authorized to serve process, when acting in an extra official capacity. 1 Wait's Pr. 543.

119. *Where the service of the summons is by publication, how may proof of such publication be made?*

It may be made by the publisher of the paper in which the publication was made, or by the printer or his foreman, or principal clerk. Wait's Code, 178.

120. *How is proof of the personal service of the summons out of the State furnished?*

Such proof must invariably be furnished by the affidavit of the person making such service, or by the admission of the party served. A sheriff's return of a service out of the State is not proof of the fact to which it certifies. 1 Wait's Pr. 546.

121. *Give some of the general requisites to the valid proof of the service of a summons?*

Every paper purporting to establish the fact that service has been made must identify the summons and connect it with the action thereby commenced. It must show that the party on whom service was made was the defendant, and that the manner of the service was according to the requirements of the statute and rules of the court. It must also show the time and place of service, in all cases except in case of service under an order for publication. Wait's Code, 178, 179; 1 Wait's Pr. 548.

122. *Can a court acquire any jurisdiction in an action until the service of a summons, or by the voluntary appearance of the defendant?*

A court can acquire a limited jurisdiction in an action by the allowance of a provisional remedy. But jurisdiction does not become complete until the service of a summons, in some of the modes prescribed by law, or by the voluntary appearance of the defendant. If the court has failed to acquire jurisdiction by the service of process, it cannot gain it by any delay on the part of the defendant in raising an objection to the invalidity of the proceedings. 1 Wait's Pr. 549; Wait's Code, 180.

123. *What is meant by an appearance?*

Any act, by which a party to an action submits himself to

the jurisdiction of a court, is an appearance. This act may consist in the service of a notice of motion, signed by an "attorney for the defendant;" or of a notice of bail; or an order extending the time to answer; or a notice of a motion to discharge an order of arrest. 1 Wait's Pr. 557.

124. What is the chief distinction between an appearance under the former system at common law and an appearance under the Code?

Under the former system, an appearance by the defendant was indispensable to a valid judgment, as it was this that gave the court jurisdiction of the person; and, in cases where the appearance of the defendant could not be compelled by summons, the court, on proof of such fact, would issue a *writ of distringas* to compel such appearance. Under the Code it is the service only that can confer jurisdiction over the person of the defendant, and when this has been done no appearance is necessary, as a valid judgment can be entered by the plaintiff, on proof of the service, and the default of the defendant. 1 Wait's Pr. 557; Wait's Code, 157.

125. When is an appearance said to be entered?

An appearance is *entered* when the notice of retainer, with proof of service, has been filed with the clerk, or the defendant has appeared in open court, claiming any right in the action. 1 Wait's Pr. 557.

126. Who may appear in an action, and how may the appearance be made?

Every person, of full age and sound mind, may appear in any civil action by attorney, or may, at his election, prosecute or defend in person. 2 R. S. 276. But, as the plaintiff must appear in the summons by attorney, and cannot at the same time appear in person, it is clear that there can be no appearance by him, in person, in the action, unless he is himself an attorney. 1 Wait's Pr. 558.

127. When an infant is a party, how must he appear in the action?

He must appear by guardian; and, where the infant is

plaintiff, the guardian must be appointed before the action is commenced. It is not necessary for an infant wife to appear by guardian, when she joins with her husband in an action, unless she sues to recover her separate property. 1 Wait's Pr. 558; 1 Wait's Code, 129.

128. How should a lunatic or idiot appear in an action?

He should appear by his committee, and if he is also an infant, then by the guardian *ad litem* appointed at the request of such committee or general guardian. 1 Wait's Pr. 559.

129. What is meant by a general appearance, and what effect has a voluntary general appearance of a defendant?

A general appearance is an admission on the part of the defendant, that he has been regularly brought into court; that the summons and its service were regular; and that the court into which he is brought has jurisdiction of his person. After such voluntary general appearance, the court acquires full jurisdiction for all purposes whatsoever. 1 Wait's Pr. 560; Wait's Code, 180.

130. What right does the defendant acquire by appearing in an action?

He acquires the right to a notice of every subsequent step in the action, and even if he has no defense to interpose, he acquires the substantial advantage of supervising all the proceedings of his adversary. 1 Wait's Pr. 560.

131. What irregularities are waived by a general appearance in an action?

A general appearance in an action waives all irregularities in the summons and its service, and even waives the want of any service whatever. It also waives all irregularities in affidavits in an action of replevin; so in actions for a penalty created or given by statute, the omission of the special indorsement will be cured by a general appearance. And a general appearance also waives all objection to jurisdiction arising from the service of process outside of the limits of the jurisdiction of the court. 1 Wait's Pr. 561.

132. What defects are not waived by appearance?

It is a general rule, that an irregularity not apparent, or not in existence at that time, will not be waived by a general appearance ; and no appearance by the defendant can waive a jurisdictional defeat relating to the subject-matter of the action. 1 Wait's Pr. 561.

133. Can a restricted or limited appearance, for the sole purpose of objecting to the irregularities in the proceedings on the part of the plaintiff, be construed as a waiver of any defect therein ?

It cannot ; but, on such appearance, the notice of motion should be signed by the moving party as "attorney for this motion only," and the motion being made, the defendant should withdraw. If, however, the objection is taken by answer which simply sets up the lack of jurisdiction, the mere subscription to the pleading will not be such an appearance as to waive any objection to jurisdiction. 1 Wait's Pr. 562.

134. Where the summons is served without the complaint, within what time may the defendant demand a copy of the latter ?

This demand must be made within twenty days from the personal service of the summons. It must be in writing, and is generally included in the notice of appearance or retainer. If the demand is served personally, the plaintiff has twenty days in which to serve his complaint ; but if services made by mail, double time must be allowed. Wait's Code, 161, 772.

135. In case the plaintiff neglects to serve the complaint within the proper time, what course should be adopted by the defendant ?

In such case, he should move for a dismissal of the complaint with costs under section 274 of the Code. 1 Wait's Pr. 568.

136. To whom, and at what time should application be made for the appointment of a guardian ad litem for an infant defendant ?

Application may be made to the court in which the action

is prosecuted, to a judge thereof, or a county judge. The application should not be made until the action has been commenced by the service of a summons. If made within twenty days after the service of the summons it must be made by the infant himself, if of the age of fourteen years or over, but if he be under that age, or neglects to so apply, then the application may be made by any other party to the action, or by a relative or friend of the infant. Wait's Code, 129, 130.

137. Are there any cases in which it may be necessary, before serving an answer in an action, to obtain leave of the court to defend?

There are. Thus, where a summons has been served by publication, if the defendant wishes to defend the action, he must first apply to the court for permission. So, if the defendant is too poor to conduct the defense, it may be proper to apply to the court for leave to defend as a poor person. Wait's Code, 170, 171 ; 1 Wait's Pr. 576.

138. What remedy, if any, has a defendant who, through mistake, surprise, inadvertence, or excusable neglect, has suffered a judgment to be entered against him?

In such case he should move the court for an order that the judgment be stayed or vacated, and that he be allowed to come in and defend. This motion must be made within a year from the notice of judgment, on the usual notice to the adverse party, or on an order to show cause. Wait's Code, 332.

139. In what cases is it proper for a defendant to make application for an order of interpleader?

It sometimes occurs that a party is made sole defendant in an action in which he has no interest beyond that of a mere stakeholder, and in which another party, who is a stranger to the action, makes a demand against him for the same debt or property which is the subject of the controversy. In cases of this nature, where the defendant admits the indebtedness to one of the parties, and refrains from complying with the demands made against him only through uncertainty as to what party is entitled to recover, he should apply for an order of

interpleader, under section 122 of the Code. Wait's Code, 145 ; 1 Wait's Pr. 580.

140. What is the effect of an order of interpleader ?

The effect of this order is to substitute, in the place of the defendant, the person not a party to the action who makes a demand against him, and to discharge the defendant from all liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct. Wait's Code, 145.

141. What classes of actions must be tried where the subject of the action is situated ?

1. Actions for the recovery of real property, or for the determination of a right or interest therein ; 2. Actions for injuries to real property ; 3. Actions for partition of real property ; 4. Actions for the foreclosure of a mortgage of real property ; 5. Actions for the recovery of personal property distrained for any cause. Wait's Code, 149.

142. Where must an action for a penalty or forfeiture, or an action against a public officer, be tried ?

An action for any of these causes must be tried where the cause of action arose. Wait's Code, 150.

143. In a transitory action, where is the proper place of trial ?

In a transitory action the place of trial should be in the county where the principal transactions between the parties occurred, and the largest number of material witnesses reside. If the parties are non-residents of the State the action may be tried in any county which the plaintiff may designate in his complaint, subject, however, to removal by the court, in the cases provided by statute. Wait's Code, 149 ; 1 Wait's Pr. 184, 185.

144. Can an action be sustained, in one of the courts of this State, to restrain the infringement of a patent right, or to recover damages for such infringement ?

No. The courts of this State have no jurisdiction over the subject-matter of patent rights. Wait's Code, 185.

145. Is it ever necessary to make application to the court for leave to sue?

This will depend upon the fact whether or not any of the parties to the action are under the control or protection of the court. If they are not, then leave to sue is unnecessary; if they are, then it is necessary. The permission of a court to sue is not, however, in any case an element of the cause of action. 1 Wait's Pr. 191.

146. In case of an omission to obtain leave of court to commence an action, what proceedings may be adopted by the defendant?

The omission in such case is merely an irregularity, which may be waived by the defendant, if he do not object in proper time and manner; or he may move to set aside the summons and complaint, upon affidavits showing that leave to sue has not been obtained. 1 Wait's Pr. 193, 194.

147. Where an action is commenced against a lunatic, without leave, what is the proper course to be adopted?

The proper course is to apply to the court which appointed the committee, for an order to restrain the prosecution of the suit, and to punish the plaintiff for contempt. In such case, if a judgment is obtained, it is merely voidable, and not void. 1 Wait's Pr. 202.

148. What remedy has a receiver, if an action is commenced against him without leave of court?

He may have a perpetual injunction against the suit. 1 Wait's Pr. 213.

149. What provision has been made by the Code for the submission of controversies without action?

By section 372 of that instrument, it is provided that parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction of such action. Wait's Code, 722.

150. Do the provisions of this section of the Code authorize the submission of actions?

No. The remedy is strictly confined to those cases in which no action has been brought. If the submission of the case did not of itself work a discontinuance of the action, it must do so when followed by a judgment, and meanwhile it would operate to suspend it. 1 Wait's Pr. 216.

151. Who may be a party to a submission of a controversy?

Any one capable of giving a legal consent may be a party to a submission. An infant, being incapable of giving a legal consent to an agreement to submit, cannot be a party, and, it seems, the court has no power to appoint a guardian for such purpose. 1 Wait's Pr. 216.

152. May a question be submitted under the provisions of the Code, merely that the opinion of the court may he had in a case where the question has not yet arisen, and where no judgment is demanded?

No. In every question of difference submitted by parties, a case must be presented for adjudication alleging a cause of action or claiming relief. A mere difference of opinion between the parties, on the question propounded to the court, is not sufficient. The controversy must be real, and a case presented in which a judgment may be rendered in favor of one party, and against the other, of the parties to the submission. Wait's Code, 723.

153. Will questions of fact be considered by the court, on the submission of a controversy?

No. The case submitted should present nothing but questions of law arising upon undisputed facts, or it will be dismissed. The court has power only to determine the questions of law arising upon the agreed state of facts, and cannot, in any case, refer the facts to a jury, or vacate the submission. Wait's Code, 723 ; 1 Wait's Pr. 218, 219.

154. Can either party to a submission be released from the legal effects of the agreement entered into?

Relief in such case may be granted by a court of equity ;

but only upon the most satisfactory evidence of fraud or mutual mistake, and even then only in a suit instituted for that purpose, and on a complaint properly framed. The nature of the equitable relief thus afforded is in a form in which the decision of the court may be reviewed, and, if erroneous, reversed. 1 Wait's Pr. 219.

155. What is the rule of the common law, in regard to the proper parties to an action?

At common law, every action upon contract must be brought by the contracting party, if living, or by his legal representative, if dead. In actions for torts, the party doing, or receiving an injury, must be made plaintiff or defendant, and, on the death of either party, the right of action also dies. 1 Wait's Pr. 88.

156. Could an assignee of choses in action sue in his own name at common law?

No. But he was allowed to prosecute an action for their recovery in the name of the assignor, upon the principle that the assignor held the legal right for the use and benefit of the assignee. And, in general, the holder of the legal right was made the plaintiff in the action. 1 Wait's Pr. 88.

157. Who was the proper party to bring suit under the old chancery practice?

The real party in interest, and the mere nominal owner of the right of action who had no interest in it could not sue, unless he had such nominal interest as trustee. 1 Wait's Pr. 88.

158. What is the rule under the Code in regard to the proper parties to an action?

By the requirements of that instrument it is made necessary that every action shall be prosecuted in the name of the real party in interest, except actions brought by an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute to sue; in which action, it is unnecessary to join as plaintiffs, the person for whose benefit the action is prosecuted. Wait's Code, 111, 121.

159. What is to be understood by the expression "real party in interest?"

By this expression is intended, that the action shall be brought in the name of the person who has the beneficial and equitable interest in the cause of action; or, who is the actual owner of it. The general rule is, that every right of action whatever, which arises upon contract, may be assigned, so as to authorize an action in the name of the assignee. 2 Wait's Law & Pr. 264.

160. Is a claim for the wrongful conversion of personal property assignable?

It is; and the assignee may maintain an action thereon in his own name. 1 Wait's Pr. 92.

161. Are all causes of action arising in tort assignable?

All causes of action arising in tort are assignable, except a cause of action for slander, for libel, or a cause of action founded upon assault and battery, false imprisonment, or injuries to the person; or, in other words, every cause of action arising upon a tort which has caused special damage to the estate of the person entitled to sue is assignable, and the assignee may maintain an action thereon in his own name. 1 Wait's Pr. 92; 2 R. S. 447, § 1; Wait's Code, 115-121.

162. Where the right of action is not assignable, by whom must the action be brought?

It must be brought by the original owner of the right, or not at all. Thus, all actions of slander, libel, assault and battery, false imprisonment, crim. con., seduction, breach of promise of marriage, and all injuries to the person, personal feelings or character, are non-assignable, and must be enforced in the name of the original party. 1 Wait's Pr. 94.

163. Can a right of action be assigned by a person under sentence of imprisonment in a State prison?

No; because a sentence of imprisonment in the State prison, for any term less than for life, suspends the civil rights of the person so sentenced during the term of such imprisonment. 1 Wait's Pr. 95.

164. *Where an agent makes a contract in his own name, but for the benefit of his principal, who is the proper party to bring an action for the breach of such contract?*

At common law, the agent alone could bring the action; but under the Code as it now stands, the action may be brought by the principal in his own name, or in the name of his agent at his election. So the agent may maintain the action in his own name; but while principal or agent may either of them maintain an action, they cannot both sue at the same time; and a recovery by one would bar an action by the other, and so of a defect in the action. 1 Wait's Pr. 97; 2 Wait's Law & Pr. 267.

165. *Can a public auctioneer, who sells goods for another, maintain an action for the price of the goods sold?*

He can, even though he has received his advances and commissions, and has no interest in the property or its proceeds. 2 Wait's Law & Pr. 267.

166. *Is it necessary, in order to give the plaintiff a right of action, that the consideration should move from him?*

It is not. An action may be maintained on a promise made by the defendant to a third person, for the benefit of the plaintiff, without any consideration moving from the plaintiff. Thus, where A loaned money to the defendant upon his promise to pay it to the plaintiff, to whom A was indebted for a like sum, it was held that an action lay. 1 Wait's Law & Pr. 107.

167. *In case of mere agency for the transmission of money, can the party for whom the money was designed maintain an action against the agent for money had and received to his use?*

He cannot. To sustain the action there must be an express promise by the agent. 1 Wait's Law & Pr. 49.

168. *Has a foreign government a right to sue in the courts of this State, and if so, upon what limitations or conditions?*

The right of a foreign government to sue in the courts of this State is undoubted; and the only limit or condition to the

exercise of this right is, that the government shall be one whose independence and sovereignty as such are acknowledged by the federal government, and that the two governments shall be at peace with each other. 1 Wait's Pr. 97.

169. When the State is plaintiff, in whose name is the action brought, and who prosecutes it?

Actions brought by the State are in the name of the people, and are prosecuted by the attorney-general in the same manner as in actions by private citizens, except when some special statute changes the rule. 1 Wait's Pr. 98.

170. May a foreign corporation sue in the courts of this State?

A foreign corporation, created by the laws of any other State or country, may prosecute in the courts of this State in the same manner as domestic corporations, upon giving security for the payment of the costs of the suit. 2 R. S. 477; 1 Wait's Pr. 99.

171. If an action is properly commenced by a corporation in its corporate name, will such action abate by a dissolution of the corporation?

It will not, but may be continued in the same name after the dissolution, and without a special application to the court. 1 Wait's Pr. 101.

172. In whose name may a joint-stock company or association sue or be sued?

Any such company or association, consisting of seven or more shareholders or associates, may sue and be sued, in the name of the president or treasurer, for the time being, of such joint-stock company or association. Laws of 1849, ch. 258; 1 Wait's Pr. 102.

173. Among the exceptions made by the Code, from the general provision that every action must be brought in the name of the real party in interest, are "actions brought by persons expressly authorized by statute to sue." Who are those persons?

This exception includes actions brought by the super-

visors of a county ; by the loan officers and commissioners of loans of a county ; by superintendents of the poor ; by supervisors of towns ; by overseers of the poor of the several towns ; by commissioners of common schools and commissioners of highways of the several towns ; by trustees of school districts ; and by trustees of gospel and school lots ; upon any contract lawfully made with them or their predecessors in their official character ; to enforce any liability, or any duty enjoined by law, to such officers or the body which they represent ; and to recover damages for any injuries done to the property or rights of such officers, or the bodies represented by them. 2 R. S. 473, § 92.

174. How may actions be brought by public officers ?

They may be brought by the officers in their own names, with the addition of the names of their respective offices. Thus suits may be brought by commissioners of highways in the names of A, B, C, etc., commissioners of highways ; or, a school district may sue in the names of the persons comprising the board of trustees, adding thereto the words, "Trustees of District Number ;" but it is advisable to prefix the word *as* to the name of the office in order to show that the claim is made by the officer and not by the individual. 1 Wait's Pr. 103.

175. In whose name should actions for penalties under the excise laws be brought ?

They should be brought in the name of the commissioners of excise, and not in the names of the persons comprising the board. Laws of 1867, ch. 621, § 22.

176. Who only can maintain a suit to enforce a trust ?

As a general rule such suit can only be maintained by the trustee, or the *cestui que trust*. As against a third person, a trustee is the proper party to bring the action. As against the trustee, the suit can only be maintained by the *cestui que trust*. 1 Wait's Pr. 105.

177. Is it necessary, under the Code, for an executor or administrator to join with him the person for whose benefit the action is prosecuted ?

It is not. The person thus vested with a representative

character may sue either in his own name, or as executor, for a debt due to his testator or to the estate. An action brought by the executor, etc., in his individual capacity, is, in general, most appropriate. 1 Till. & S. Pr. 467; Wait's Code, 121.

178. What is the rule as to the right of aliens to sue in the courts of this State?

The right to sue in the courts of this State is granted to alien friends, but not to alien enemies; and the mere circumstance of residing in a foreign country, which is at war with this country, and of carrying on trade there, is sufficient to constitute one an alien enemy who would not otherwise be so considered. 1 Wait's Pr. 107.

179. What is the distinction made in this State, as to the relative rights of residents and non-residents to maintain an action in any court of the State?

The only distinction is in relation to security for costs, such security being required when the action is brought by one against whom the court could not enforce a judgment in case he should fail to establish his right to recover. 1 Wait's Pr. 106.

180. Can a foreign executor, as such, sue in the courts of this State?

He cannot. Letters of administration are valid only within the State where they are granted, and before the courts of this State can recognize the personal representative of a deceased non-resident, he must be clothed with authority derived from the laws of this State. The disability does not extend, however, to his assignee, who may sue in his own name. 1 Wait's Pr. 109.

181. How can an infant bring an action?

He must have a guardian specially appointed for the purposes of the action; and if he fails to do so, the defendant may move to have the proceedings set aside for irregularity. Wait's Code, 130.

182. Can an idiot, lunatic, or habitual drunkard sue alone?

No. The action must be brought in the name of the

idiot, lunatic or drunkard, by the committee having control of his estate ; or such committee must maintain the action in his own name, as trustee of an express trust. 1 Wait's Pr. 110.

183. Must her husband be joined in every action in which a married woman is a party plaintiff?

He must, except when the action concerns her separate estate, or is one between herself and husband. Wait's Code, 127.

184. What is the nature of the interest which will authorize a joinder of parties plaintiff, under the Code?

A common interest in the claim made in an action will authorize such joinder ; but it is not necessary that the relief sought by each should be identical in character and amount. Thus, different persons, owning separate tenements, injuriously affected by a nuisance may join in a suit to restrain its continuance. So the several proprietors of different lands and mills, and of separate parts of a natural water-course, may unite in an action to restrain a third party from diverting the water from its natural channel. 1 Wait's Pr. 111.

185. Where there are several complainants having distinct and independent claims to relief against a defendant, can they join in a suit for the separate relief of each?

As a general rule, they cannot. Thus, individual purchasers of distinct portions of the same estate cannot jointly maintain an action to restrain the prosecution of separate actions of ejectment against each purchaser ; neither could they unite in one suit against such vendor to compel a specific performance of the contract of sale, for each contract being separate and independent, each case must depend on its own peculiar circumstances. 1 Wait's Pr. 111, 112.

186. What interest will compel a joinder of plaintiffs?

When the plaintiffs have a joint interest in the claim, they must join in the suit. Wait's Code, 137.

187. To what cases is this rule applicable?

Under the rule joint tenants, co-trustees, partners, joint

owners, or joint contractors, must be joined as plaintiffs, unless it should be in the exceptional case of a party refusing to join as plaintiff, or except in an action in which the rights of general and special partners are involved, or where the rights of tenants in common may be involved. Wait's Code, 137.

188. *If a person is a partner in two separate firms, one of which sues the other, must such partner be joined as a plaintiff in the action?*

He may elect to be either plaintiff or defendant, and the other partners may sue or defend without him. 1 Till. & S. Pr. 474.

189. *Is it necessary in any case to join an assignor in an action brought by an assignee, in respect to the property assigned?*

It is, where the assignor still retains a contingent interest in the thing assigned. Thus where a mortgage has been assigned as a security for a debt, the assignor has still such an interest in the mortgage as will render him a necessary party to the action of foreclosure. 1 Till. & S. Pr. 473, 474.

190. *In what actions must joint tenants and tenants in common join?*

They must join in actions *ex delicto*, for injuries to personal property. So in an action for damages to real estate. And in actions for the use or hire of property owned by tenants in common, all the owners must be joined. 1 Wait's Pr. 114.

191. *What provision has been made by the Code, to meet the case, where one of several plaintiffs refuses to sue?*

It provides that, if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. Wait's Code, 137.

192. *Suppose the parties to the action are very numerous, or the question litigated is one of common or general interest, is it necessary to join as plaintiffs or defendants all who are united in interest?*

It is not. The Code provides that, in either of these cases,

one or more may sue or defend for the benefit of the whole. Wait's Code, 137, 138.

193. *What is the proper remedy of a defendant, when sued by a party other than the real party in interest?*

If the defect is apparent on the face of the complaint, his remedy is by demurrer; but where the defect does not appear upon the face of the complaint, the objection may be taken by answer. 1 Wait's Pr. 119.

194. *Suppose a plaintiff miscalls himself by a name which represents no person, real or artificial, what is the proper remedy of the defendant?*

In such case the remedy of the defendant is by a motion to set aside the service of the summons. Thus, where an individual banker sues in a name importing a corporate character, the defendant, if aggrieved, should move to set aside the first proceeding in the suit. 1 Wait's Pr. 119.

195. *Have the courts of this State any jurisdiction over actions in which a State is defendant?*

They have not. The exclusive jurisdiction of such actions is vested in the courts of the United States. 1 Wait's Pr. 121.

196. *What is the general rule in regard to the joinder of defendants, in actions under the Code?*

Any person may be made a defendant who has or claims an interest adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. Wait's Code, 133.

197. *Would it be proper to join in the same action as defendants the guarantor and the maker of a promissory note?*

It would not; because a promissory note and a guaranty of payment written upon it are different instruments, and impose distinct and different obligations. And the fact that the note and the contract of guaranty are upon the same paper does not bring the case within the provisions of the Code, allowing persons severally liable upon the same obligation or

instrument, to be included in the same action at the option of the plaintiff. Wait's Code, 139; 1 Wait's Pr. 132, 133.

198. In an action for partition, who must be made parties?

All tenants in common are indispensable parties, and by the strict rules of law all persons must be made parties who have, by any means or contingency, an interest in the premises. A decree for a partition cannot be made unless all the persons interested in the premises are made parties to the suit. 1 Wait's Pr. 135.

199. In actions against partnerships; must all the partners be joined as defendants?

They must be, if known. But, where credit is given to a firm supposed to consist of a certain number of persons, the persons extending such credit may sue the known partners without joining others unknown at the time of the transaction on which the suit is founded, and whose connection with the firm was in no way notorious or disclosed. 1 Wait's Pr. 136.

200. Who are necessary defendants in actions against limited partnerships?

In actions against limited partnerships the general partners only are necessary defendants, and an action may be maintained against them in the same manner as if there were no special partners. But where the name of any special partner is used in the firm with his privity, he must be deemed a general partner. 1 R. S. 766, §§ 13, 14.

201. In actions merely personal, for the recovery of money only, would it be proper to join defendants primarily and personally liable, with others liable only in a representative capacity?

As a general rule, it would not. When parties are *jointly and severally* liable, either for torts or upon contracts, the personal representatives of the deceased parties may be proceeded against by action at the same time with actions against the surviving parties, but it must be by separate actions and not by joining both classes of defendants in one action. 1 Wait's Pr. 137.

202. *What is the remedy of the defendant, against an omission on the part of the plaintiff to join all necessary parties defendant?*

His remedy is by demurrer where the defect appears upon the face of the complaint, and by answer where it does not so appear. But before the defendant can demur for want of parties, it must appear that his interest requires that such other party should be made a defendant. 1 Wait's Pr. 139; Wait's Code, 234, 239.

203. *In what cases, under the Code, may the representatives of a deceased sole plaintiff be substituted in the place of the deceased?*

In every case where the cause of action survives. But until this substitution has been properly effected, no further proceedings can be had in the cause, nor can any judgment, order or decree be entered unless it would, in effect, put an end to the suit. 1 Wait's Pr. 141.

204. *When does a cause of action survive to the personal representatives of a deceased plaintiff?*

A cause of action survives to the personal representatives of a deceased plaintiff, in all cases where the act or omission which forms the subject of the action has injuriously affected the *estate* of the deceased. This rule is applicable to actions *ex delicto* as well as to actions *ex contractu*. 1 Wait's Pr. 142.

205. *When does an action continue to a representative or successor in interest?*

An action so *continues*, whenever the right of action vests by law, on the death of a plaintiff, in the surviving owners of the same demand. Thus, in an action brought by a partnership the cause of action does not go to the personal representatives of a deceased plaintiff, but remains or *continues* in the surviving plaintiffs. 1 Wait's Pr. 143.

206. *Is an order of substitution necessary, on the death of one of several plaintiffs having a joint legal interest?*

No order of substitution is necessary in such case, as the action may be continued by the survivors. It is necessary,

however, to inform the court why the name of the deceased is omitted, and this may be done by spreading upon the records of the court a suggestion of death as provided in the Revised Statutes. 1 Wait's Pr. 147; 2 R. S. 386, § 1.

207. Does an action abate on the death of a sole defendant?

The Code provides that, when the cause of action *survives or continues*, the action will not abate on the death of the defendant, but may be continued against his personal representatives. Wait's Code, 139.

208. What is the effect on the action of the death of a sole defendant, in replevin?

The action wholly abates, and the court has no power to order the action to be continued against the personal representatives of the defendant. 1 Wait's Pr. 152, 153.

209. After a verdict has been rendered in an action for a wrong, where the cause of action does not survive, will the death of the defendant cause the action to abate?

It will not; but the case may proceed thereafter in the same manner as in cases where the cause of action now survives by law. Wait's Code, 139; 1 Wait's Pr. 153.

210. Will the death or removal of a public officer have the effect of discontinuing or abating an action brought by or against him in his official capacity?

No. The court in which the action is pending may substitute the name of the successor of such officer, either upon the application of such successor or of the adverse party. Wait's Code, 145, 146; 2 R. S. 474, § 100.

211. Upon the death of one of several defendants, in an action upon a joint liability, does the action abate, and, if not, against whom must it be continued?

The death of one of several parties, jointly liable, does not abate the action, and it must be continued against the survivors alone, as it is not generally proper, in an action at law, to join the legal representatives of a deceased joint debtor as defendants with the surviving debtor. 1 Wait's Pr. 153.

212. *In actions upon a joint and several liability, how may the defendants be proceeded against?*

In such actions the plaintiff has a right to elect whether he will proceed against the defendants severally, or, treating the obligation as joint, proceed against all jointly in one action. If he adopts the latter course, and, after the action is commenced, and before judgment, one of the defendants dies, the plaintiff may treat the action as abated, as against the deceased defendant, and proceed regularly against the remaining defendants. 1 Wait's Pr. 154.

213. *What is meant by civil death, and what is the effect of civil death on pending questions?*

A person, sentenced to imprisonment in a State prison for life, is thereafter to be deemed civilly dead; and the rules applicable to the abatement and revivor of actions, in cases of actual death, apply equally to cases of civil death. If the cause of action survive or continue, it may be revived in the name of the personal representatives of the party imprisoned. 2 R. S. 701, § 20; 1 Wait's Pr. 155.

214. *When an action has abated by the death of a party, and the cause of action survives or continues, what is the proper manner of effecting a change of parties by the substitution of the personal representatives or successors in interest of the deceased?*

The proper manner of effecting such change is by application to the court for an order directing such substitution, provided always that such motion is made within one year from the time of the death of the party. After a year has elapsed since the death of the party, an application by motion is no longer proper, and the suit can only be continued by filing a supplemental complaint. No application to the court for permission to file this complaint is necessary or proper. It is a matter of strict right. 1 Wait's Pr. 156.

215. *In case of a transfer of the interest of a sole plaintiff, in whose name may the action be continued?*

In case of any transfer of interest other than that resulting from the death, marriage or other disability of a party, the

action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Wait's Code, 139, 140.

216. In what mode is the change of parties effected, in the case of a transfer of interest?

Such change can be effected only on the motion of the transferee. The motion should be made at special term, and may be on notice or *ex parte*. The practice is similar to that on any other motion. 1 Wait's Pr. 161.

217. When does it become the duty of the court to order additional parties, before further progress in the action?

Where there are any persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, it is the imperative duty of the court to order such persons to be made parties. 1 Wait's Pr. 161, 162; Wait's Code, 145.

218. In what cases is the addition of parties discretionary with the court?

In all cases where a stranger to the suit is authorized to apply to the court for leave to come in and be made a party, the allowance or denial of the order rests wholly in the discretion of the court. 1 Wait's Pr. 163.

219. Is a party in any case entitled to the remedy of interpleader, where he has an adequate remedy at law?

He is not. It is essential to the right to this remedy that the party asserting that right has no protection at law against the consequences of the conflicting claims, or that the legal remedy, if any exists, is inadequate to afford complete protection against them. 1 Wait's Pr. 169.

220. What must the complaint show, in order that an action of interpleader may be maintained?

It must show: 1. That two or more persons have preferred a claim against the plaintiff; 2. That they claim the same thing; 3. That the complainant has no beneficial interest in the thing claimed; and 4. That he cannot determine, without haz-

ard to himself, to which of the two defendants the thing of right belongs. It must also show that the complainant can in no other way be protected from an oppressive or vexatious litigation in which he has no personal interest. 1 Wait's Pr. 174.

221. *Who alone is entitled to make application for an order of interpleader?*

Application for the order can be made only by a defendant against whom an action is pending upon a contract, or for specific real or personal property. In no other case is an application authorized by the Code. Wait's Code, 145.

222. *What must be shown in the affidavit upon which the application is made by the defendant?*

1. That an action upon contract, or for specific real or personal property, is pending against him, in which issue has not been joined ; 2. That a person not a party to the action has made a demand against him for the same debt, duty or property ; 3. That he is not in collusion with said person ; 4. That he is indifferent to the claims of either party ; and 5. That he has no interest in, and has made no claims upon, the property in controversy, but is ready and willing to deposit the same in court to abide the event of the action. 1 Wait's Pr. 177.

223. *If cattle, belonging to several owners, are found trespassing in the grounds of an individual, can the several owners be joined as defendants in an action for damages?*

No ; each owner is liable for the damage done by his own cattle, and no more. So, if several dogs do mischief by worrying sheep, a joint action will not lie against all the owners. 2 Wait's Law & Pr. 286, 287.

224. *Can a person be both plaintiff and defendant in an action?*

No. Thus a trustee of a religious society cannot be sued by his co-trustees as a trespasser, in respect to the property of the society, until he has been divested of his character and authority as trustee. His possession is the possession of his

co-trustees, and his right is equal to that of the others. 2 Wait's Law & Pr. 286.

225. What remedies given by the Code are commonly denominated "provisional remedies?"

The provisional remedies of the Code are such as may or may not be resorted to by the plaintiff in specified cases, for the purpose of rendering a future judgment effectual, or for the purpose of giving effect to one already obtained. These remedies are: Arrest and bail, claim and delivery, injunctions, attachments, and receivers.

226. Is the writ of ne exeat an existing remedy?

It is recognized as an existing remedy by the supreme court of this State, but is held by the superior court of New York city to be abolished by section 178 of the Code. Thomp. Prov. Rem. 567; Wait's Code, 341, note a.

227. Upon what statutes does the right of arrest in civil actions depend?

The right of arrest depends upon the provisions of the Code, the non-imprisonment act, and the provisions of the Revised Statutes relating to proceedings for contempts. Wait's Code, 338, § 178; Thomp. Prov. Rem. 10; 1 Wait's Pr. 592.

228. Can a right of arrest exist independent of a right of action?

It cannot. If the right of action has not accrued, or is barred by the statute of limitations the right to maintain an arrest does not exist. 1 Wait's Pr. 589; Thomp. Prov. Rem. 12.

229. State generally who are exempt from arrest in civil actions under the laws of the United States.

By the laws of congress, ambassadors, foreign ministers and their domestic servants, consuls and vice-consuls, members of congress while acting as such, and, in certain cases, soldiers and sailors in the United States service are exempt from arrest. 1 Wait's Pr. 592; Thomp. Prov. Rem. 72-74.

230. Who are temporarily exempt from arrest under the laws of this State?

By the statutes of this State, members and officers of the

State legislature, members of the State militia, policemen, canal commissioners, voters on election day, officers of courts of record, jurors, witnesses and parties to suits are exempt from arrest while acting in the capacity indicated. 1 Wait's Pr. 595-600; Thomp. Prov. Rem. 72-78.

231. In what cases may the rights to exemption from arrest be waived by the party arrested?

When the right to exemption from arrest has been conferred by the statutes of this State or of the United States from motives of public policy and not for the convenience of the individual, the privilege from arrest cannot be waived by the party arrested. But when the right is purely personal it may be waived by the act of the party. 1 Wait's Pr. 604.

232. A, in an action against B, sets forth in his complaint a cause of action for fraud and deceit in the obtaining of goods on credit, joined with a cause of action on certain promissory notes given to A by B, in the same transaction. Can A obtain the arrest of B in the action?

He cannot. It is a general rule that where there is one principal cause of action in the complaint that will not justify an order of arrest, no arrest can be maintained. 1 Wait's Pr. 604, 605.

233. Can an arrest be had in an action upon a judgment, if the original cause of action was one that would justify the issuing of an order of arrest?

If the judgment upon which the action is brought was rendered in a court of this State no arrest can be had. But if the judgment was rendered in the court of a sister State the right of arrest in an action upon it in this State depends upon the laws of the State where the judgment was rendered. If by the laws of such State the original cause of action is merged in a judgment, no arrest can be had in an action upon the judgment. But if the cause of action is not so merged, the defendant may be arrested. 1 Wait's Pr. 602; Thomp. Prov. Rem. 34, 49.

234. What class of defendants may be arrested in all actions for the recovery of damages on a cause of action not arising out of contract?

Defendants who are either non-residents or who are about to remove from the State. Wait's Code, 342, § 179; 1 Wait's Pr. 610.

235. What is the practice in regard to the allowance of an order of arrest in actions of slander and libel, and for assault and battery?

The order is seldom granted in such actions unless the defendant is a transient person or is about to depart from the State. The order is, however, sometimes granted in cases of violent and cruel batteries where the defendant is neither a non-resident nor about to depart from the State. 1 Wait's Pr. 614; Wait's Code, 343. But see Thomp. Prov. Rem. 21.

236. In what actions may a female be arrested?

A female can be arrested only in an action for a willful injury to person, character or property. Wait's Code, 343, § 179, note c; 1 Wait's Pr. 631; Thomp. Prov. Rem. 55.

237. When is an agent employed in a "fiduciary capacity," so as to render him liable to arrest in an action for money received or property embezzled or fraudulently misapplied?

If the principal is entitled to recover back the specific property intrusted to his agent, he is employed in a fiduciary capacity; but if the agent has the right to receive money or property, and use it as his own, holding himself accountable to his principal for the debt so created, then the agent is not acting in a fiduciary capacity. 1 Wait's Pr. 619.

238. A, having become insolvent, closed up his business and made an assignment for the benefit of his creditors. Afterward, without disclosing the fact of his insolvency, he purchases goods of B, on credit, for which he fails to pay when the time for which the credit was given has expired. Can B obtain the arrest of A, in an action to recover the value of the goods?

If the purchase by A was one of many similar transactions

between the parties, he is liable to arrest, as a failure to disclose the fact of insolvency, in such cases, amounts to a fraud upon the vendor, and is a sufficient ground for arrest. But the rule is otherwise where a purchaser merely omits to disclose the fact of his insolvency, and there is nothing in the transaction inconsistent with an honest intent to pay the debt contracted. 1 Wait's Pr. 625.

239. *What must be the character of the false representations, made in obtaining the sale of goods, that will render the purchaser liable to arrest?*

The representations must be not only false in fact, and cause loss to the vendor, but they must have been made with intent to deceive. Falsehood, the intent to deceive, and damages, must concur to entitle the plaintiff to the right to arrest the defendant. 1 Wait's Pr. 624, 628.

240. *A, having no knowledge whatever in relation to the solvency of B, recommends him to C as being a responsible party; and C, relying upon the representations of A, sells B goods on credit. Can C, on its appearing that B is unable to pay for the goods, and was insolvent at the time of their purchase, obtain the arrest of A, in an action for fraud and deceit?*

He can, if it also appears that A made the representations in a manner calculated to induce the belief that he had knowledge of the solvency of B, and that such representations were made with intent that they should be so believed. 1 Wait's Pr. 629.

241. *If the plaintiff in an action is entitled to the arrest of the defendant, would the assignee of the right of action have been entitled to the same remedy, if the right of action had been assigned?*

He would. The assignee is entitled to all the remedies of which the assignor might have availed himself, had the action been between the original parties. 1 Wait's Pr. 633.

242. *To whom would you apply for an order of arrest?*

The application may be made either to the judge of the

court in which the action is brought, or to the judge of the county where the action is triable, or to the judge of the county in which the attorney for the moving party resides. 1 Wait's Pr. 635 ; Wait's Code, 354, § 183.

243. What papers are necessary upon such application?

An affidavit or affidavits showing the existence of a cause of action, and that the case is one of those mentioned in section 179 of the Code. 1 Wait's Pr. 636 ; Wait's Code, 354, § 181.

244. When will the complaint alone be a sufficient affidavit upon which to base an application for an order of arrest?

When the right of arrest and the right of action are identical, a complaint properly drawn and verified will be a sufficient affidavit upon which to base an application for an order of arrest. 1 Wait's Pr. 639.

245. What security is required on the part of the plaintiff before an order of arrest can issue?

The plaintiff is required to give a written undertaking, with or without sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least \$100. 1 Wait's Pr. 646 ; Wait's Code, 355, § 182.

246. If an order of arrest erroneously describe John Smith as James Smith, and John Smith is arrested under the order, will the arrest be regular and legal?

It will not. The officer, by making the arrest, renders himself liable to an action for false imprisonment, although the party arrested was the one intended to be described in the order. 1 Wait's Pr. 656.

247. Where only can a sheriff make a legal arrest?

A sheriff can make a legal arrest within the limits of his county only, and an arrest made by him outside of his county is void. 1 Wait's Pr. 657.

248. What are the relations between the principal and his bail, in respect to the custody of the former?

The principal, when at large on bail, is, in the contemplation of the law, a prisoner in the custody of his bail. The bail may at any time and at any place, without process or authority from the court, arrest their principal, and surrender him to the sheriff of the county where he was originally arrested. In this respect, the principal stands in the same relation to his bail that an escaped prisoner does to the sheriff. 1 Wait's Pr. 670-672.

249. Within what time must a defendant who has been arrested apply for an order vacating the order of arrest, or reducing the amount of bail?

The order may be applied for at any time before judgment; or where the arrest was made within the twenty days immediately preceding the rendition of the judgment, the motion may be made within twenty days from the service of the order of arrest. 1 Wait's Pr. 695, 696.

250. What remedy is given by the Code in the place of the old action of replevin?

The action for the recovery of the possession of personal property, together with the provisional remedy called "claim and delivery," takes the place of the old action of replevin, which was abolished by the Code. Wait's Code, 371; 1 Wait's Pr. 710.

251. A wishes to recover the possession of certain personal property which is wrongfully detained by B. Is it necessary to accomplish this, that he should resort to the provisional remedy given by section 206 of the Code, and known as claim and delivery?

It is not strictly necessary, as the judgment in an action for the recovery of the possession of personal property, if rendered in favor of the plaintiff, may be for the possession, or for the recovery of possession or the value thereof, in case a delivery cannot be had, and of damages for the detention. The provisional remedy is principally employed to prevent a disposal of the property claimed before a judgment can be

recovered in an action. 1 Wait's Pr. 711; Wait's Code, 519, § 277; id. 373, *note j.*

252. When should a demand for the goods claimed precede an action for the recovery of their possession?

Whenever the defendant came lawfully into the possession of the goods claimed and merely detains them, a demand for the goods is necessary before action. But where the defendant came wrongfully into the possession of the goods no demand is necessary. 1 Wait's Pr. 724.

253. What will be the effect of an unconditional offer to restore the property on demand?

The effect of an unconditional offer to restore the property, when a demand is made, is to defeat the right to maintain an action for its recovery. 1 Wait's Pr. 725.

254. What papers are necessary to entitle the plaintiff to a delivery of property before judgment?

There must be (1) an affidavit setting forth the facts upon which the statute gives the remedy, and having indorsed upon it a requisition to the sheriff to take the property and deliver it to the plaintiff; and there must be, also, (2) an undertaking conditioned for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff. Wait's Code, 373, 374.

255. What are the requisites of an affidavit upon which a plaintiff may obtain, before judgment, the delivery of the property claimed?

The affidavit must show: 1. That the plaintiff is the owner of the property claimed, or is lawfully entitled to its possession by virtue of a special property therein; 2. That the property is wrongfully detained by the defendant; 3. The alleged cause of the detention of the property, according to the affiant's best knowledge, information and belief; 4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or if so seized that it is

exempt from such seizure; and, 5. The actual value of the property. 1 Wait's Pr. 726; Wait's Code, 373, § 207.

256. *Within what time must the defendant except, if at all, to the sufficiency of the sureties executing the undertaking on the part of the plaintiff?*

He must except within three days after the service of the copy affidavit and undertaking, or he will be deemed to have waived his objection to their sufficiency. Wait's Code, 376, § 210.

257. *When will and when will not the sheriff be liable to a third party, whose goods he has taken on replevin process?*

The officer will be protected by his process so far as he acts within its directions. The officer is required to take the property described in the affidavit of the plaintiff, *when it is found in the possession of the defendant or his agent*, and if he takes the property from the possession of any other person he is liable to the true owner as a trespasser. 1 Wait's Pr. 739.

258. *In what manner should a third party proceed to obtain the possession of his property, when it has been taken by the sheriff in replevin?*

If the property was taken by the sheriff, in the discharge of his duty, and in accordance with the requirements of his process, the owner of the goods should make an affidavit of his title thereto and right to its possession, stating the grounds of such right and title, and serve the same upon the sheriff. If the plaintiff or defendant fail to indemnify the sheriff against such claim, it is his duty to cease to exercise further control over the property, so that the owner may resume its possession. But if the proceedings of the sheriff, in taking the property, were not in accordance with the requirements of his process, then the true owner may assert his right in an action of trespass, trover or replevin. 1 Wait's Pr. 742; Wait's Code, 378, § 216.

259. *What has the Code substituted in the place of what was known under the former practice as the writ of injunction?*

Injunction by order has been substituted in place of the

writ of injunction abolished by the Code. Wait's Code, 378, § 218.

260. How many kinds of injunctions are there?

There are two general classes of injunctions, viz., temporary and final, or, as they are often termed, *provisional* and *perpetual*. The temporary injunctions are such as issue during the pendency of the action, and before judgment, while the final injunctions are such as are awarded by the decree or judgment of the court after a final hearing upon the merits. Thomp. Prov. Rem. 197; Wait's Code, 379, note a.

261. For what purposes does the Code authorize the granting of a temporary injunction?

1. To restrain, pending the action, some act against which the plaintiff asks, in his complaint, for a perpetual injunction;
2. To restrain the defendant from doing some act respecting the subject of the action, in violation of the plaintiff's rights, and tending to render the judgment ineffectual;
3. To restrain the defendant from so disposing of his property as to defraud his creditors. Thomp. Prov. Rem. 204; Wait's Code, 379, § 219.

262. At what stage of an action may a temporary injunction issue?

A temporary injunction may issue at the time of commencing the action, or at any time afterward before judgment. Thomp. Prov. Rem. 316; Wait's Code, 390, § 220.

263. When may and when may not an injunction be granted *ex parte*?

It is customary to grant injunctions on an *ex parte* application where the motion is made at the commencement of the suit, and before answer. But, after the defendant has answered, the injunction can be granted only upon notice, or upon an order to show cause. Thomp. Prov. Rem. 199; Wait's Code, 391, § 221.

264. What is the rule of the supreme court respecting orders granting injunctions on *ex parte* applications?

Rule ninety-four provides that whenever an injunction

shall be granted *ex parte*, the order granting such injunction shall contain an order to show cause, on some day within ten days, why such order should not be continued in force. Wait's Code, 878.

265. *What notice is required where an injunction is sought to restrain the general and ordinary business of a corporation or joint-stock association?*

An injunction to suspend the general and ordinary business of a corporation or a joint-stock association, or to restrain or prohibit any director, trustee or manager of the same from the performance of his duties as such, cannot be granted except by the court, and upon a notice of at least eight days. An injunction granted upon less notice is void. Laws of 1870, ch. 157, § 1; Wait's Code, 395, note a.

266. *What security is required by the Code upon the granting of an injunction?*

The Code requires that where no other provision is made by statute, as to security upon an injunction, a written undertaking shall be given on the part of the plaintiff with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction if the court shall finally decide that the plaintiff was not entitled thereto. Wait's Code, 391, § 222; Thomp. Prov. Rem. 324.

267. *To whom would you apply for an order vacating or modifying an injunction granted on an ex parte application?*

The order may be granted either by the judge who granted the injunction, or by the court in which the action is brought. The application may be *ex parte* if made to the judge who granted the injunction, but if made to any other judge it must be upon notice. Thomp. Prov. Rem. 334; Wait's Code, 396, 645, §§ 225, 324 and notes.

268. *Is the party enjoined under any legal obligation to obey an injunction erroneously granted or irregularly served?*

He is; and any disobedience to the mandates of an injunc-

tion, however erroneously granted, may be punished by attachment for contempt. Thomp. Prov. Rem. 331 ; Wait's Code, 381, *note d.*

269. *What are the principal points of difference between attachments under the Code and attachments under the Revised Statutes ?*

Under the Revised Statutes an attachment was the original process by which an action was commenced ; under the Code it is not. Under the Revised Statutes the attachment was for the benefit of all the creditors ; under the Revised Statutes it is for the benefit of the attaching creditor only. Thomp. Prov. Rem. 349 ; Wait's Code, 399, *note a.*

270. *What is the meaning of the clause of section 227 of the Code which provides that for the purposes of that section an action shall be deemed commenced when the summons is issued ?*

The clause referred to was added to section 227 of the Code by the amendment of 1866, for the purpose of avoiding the construction given by the court of appeals to the three first words of the section which were held to prohibit the allowance of an attachment before the defendant had been brought into court by the service of a summons. The amendment permits the allowance of an attachment, and even its service before the service of the summons, subject, however, to the condition that unless personal service of the summons is made, or publication commenced within thirty days, the attachment will become inoperative and void. Wait's Code, 400, *note c.*; Thomp. Prov. Rem. 373.

271. *Can an attachment properly issue in an action founded on tort ?*

It cannot, except in an action for the conversion of personal property, which is the only exception to the general rule. Thomp. Prov. Rem. 350.

272. *Who may grant a warrant of attachment ?*

A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county-judge. Wait's Code, 402, § 228 ; Thomp. Prov. Rem. 385.

273. On an application for a warrant of attachment, what papers must be presented to the judge before the warrant can issue?

There must be an affidavit setting forth the facts essential to confer jurisdiction to grant the order; and also a written undertaking to the effect that, if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant and all damages he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least \$250. Wait's Code, 402, 406, §§ 229, 230.

274. State generally what property may be attached.

It is a general rule that whatever may be seized and sold under execution may be attached. But shares or rights in any association or corporation and choses in action may be attached, although not subject to a levy and sale under an execution. Thomp. Prov. Rem. 389, 390; Wait's Code, 409, 411.

275. How must an attachment be executed upon property incapable of manual delivery, such as the rights or shares which the defendant may have in the stock of any association or corporation, or debts due to the defendant, etc.?

The sheriff should execute the attachment in such cases by delivering to the president or other head of the association or corporation, or its secretary, managing agent or cashier, or to the debtor or person holding such property, a certified copy of the warrant of attachment, with a notice specifying the precise property levied on, and also its nature and amount. Thomp. Prov. Rem. 419; Wait's Code, 412.

276. How may a defendant obtain the discharge of an attachment?

In two ways: 1. By motion founded upon affidavits, or upon the plaintiff's application and proceedings; 2. By giving security to the plaintiff as provided by section 241 of the Code. Thomp. Prov. Rem. 445, 446.

277. In what cases may a receiver be appointed before judgment?

A receiver may be appointed before judgment on the application of either party, where he establishes an apparent right to the property which is the subject of the action, and which is in the possession of the adverse party, and the property, or its rents and profits are in danger of being lost or materially injured or impaired, except in cases where judgment upon failure to answer may be had without application to the court. Wait's Code, 419, § 244.

278. In what cases may a receiver be appointed after judgment?

A receiver may be appointed after judgment: 1. To carry the judgment into effect; 2. To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment. Wait's Code, 419, § 244.

279. Does a receiver in an action represent the party whose estate he receives or the creditors of such party?

He represents both, and also all parties interested in the action. Thomp. Prov. Rem. 466; Wait's Code, 422, notes *j*, *k*.

280. If A is appointed receiver, in supplementary proceedings, by a judge of the county court, and the judgment upon which such proceedings were founded was rendered in the supreme court, to which court should the receiver apply for such instructions as may be necessary to the proper execution of his trust?

He should apply for instructions to the supreme court. Thomp. Prov. Rem. 520.

281. What is the rule of the supreme court relating to orders appointing receivers on ex parte applications?

Rule ninety-four of the supreme court provides that, whenever a receiver shall be appointed *ex parte*, the order appointing such receiver shall contain an order to show cause, on

some day within ten days, why such order should not be continued in force. Wait's Code, 878.

282. *In what cases will the court compel a party to deposit money or property in court, or pay or deliver the same to the party to whom it is due or belongs?*

When it is admitted by the pleading or examination of a party that he has in his possession, or under his control, any money or other thing capable of manual delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court. Wait's Code, 420, § 244; Thomp. Prov. Rem. 557.

283. *In what manner may such order be enforced?*

The party ordered to make the deposit or deliver the property may be punished for disobedience to the order, as for contempt; and the court may also make an order requiring the sheriff to take the money or property, and deposit, deliver or convey it in conformity with the direction of the court. Wait's Code, 420, § 244; Thomp. Prov. Rem. 557.

284. *In what cases may the court, on motion, compel the defendant to satisfy a part of the plaintiff's claim?*

Whenever the answer of the defendant, expressly or by not denying, admits part of the plaintiff's claim to be just. Wait's Code, 420, § 244; Thomp. Prov. Rem. 561.

285. *How may the court enforce an order directing the defendant to satisfy a part of the plaintiff's claim admitted due?*

The court may enforce the order as it enforces a judgment or provisional remedy, viz., by execution, or by an attachment, as for contempt. The order will, however, be enforced by attachment only where the defendant would, upon final judgment, be liable to imprisonment; and in other cases the order will be enforced by execution. Thomp. Prov. Rem. 564; Wait's Code, 426, note i.

286. What is a trial?

A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact; and there can be no trial until issues have actually been formed. Wait's Code, 443; 2 Till. & S. Pr. 424.

287. Is the regular argument of a demurrer a trial?

It is. Till. & S. Pr. 425.

288. When may an action be regularly brought to trial?

An action must not be brought to trial until all the defendants, whose presence is necessary to a proper decision of the cause, have been served with the summons, or have appeared in the action; nor until they have all answered, or their time for answering has expired; nor until it is in a situation for final judgment between all the parties. Till. & S. Pr. 425; Wait's Code, 443.

289. By whom may the action be brought to trial?

The action may be brought to trial by any party thereto, who has given notice of trial, provided he is the sole plaintiff or defendant. So even if he is not such sole party, yet the court may, in its discretion, permit any single party, who has given notice, to bring the action to trial. Wait's Code, 450, 451; 2 Till. & S. Pr. 42.

290. Where there are issues of law and of fact joined in one action, which of the issues must be first tried?

The *issues of law*, unless the court otherwise directs. If an issue of fact is tried before an issue of law in the same action, it will be presumed, in the absence of any objection at the trial, to have been so tried by direction of the court. Wait's Code, 443.

291. How must an issue of law be tried?

An issue of law must be tried by the court, unless it be referred. Wait's Code, 443.

292. In what actions may a trial by jury be demanded as a matter of right?

1. Actions for the recovery of money only; 2. For the recovery of specific, real or personal property; 3. For divorce

on the ground of adultery ; 4. For the abatement of a nuisance, and the recovery of damages or a penalty, no injunction or other equitable relief being demanded. Wait's Code, 443, 444 ; 2 Till. & S. Pr. 427.

293. How are the issues in every other action to be tried?

They are triable by the court ; which may, however, order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. But this must be done, if at all, before the cause has been actually tried by the court. Wait's Code, 445.

294. How may trial by jury be waived by the several parties to an issue of fact?

In actions on contract, with the assent of the court, and in other actions, trial by jury may be waived ; 1. By failing to appear at the trial ; 2. By written consent, in person or by attorney, filed with the clerk ; 3. By oral consent in open court, entered in the minutes. If parties proceed to trial without a jury they cannot afterward object on that account, although they might be entitled to a jury. So, after proceeding to trial by a jury, without objection, neither party can avail himself of the fact that the court had no power to summon a jury. Wait's Code, 477 ; 2 Till. & S. Pr. 428. . . .

295. What are the qualifications of jurors as required by the general statutes of this State?

They must be ; 1. Male inhabitants of the town not exempt from serving on juries ; 2. Of the age of twenty-one years and upward, and under sixty years old ; 3. Owners of real property worth \$150, or of personal property worth \$250, for which they are assessed ; 4. In the possession of all their natural faculties, and not infirm or decrepit ; 5. Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, and well informed. 2 R. S. 411 ; 2 Wait's Law & Pr. 589, 590.

296. How is the jury called and sworn, and what is the requisite number of jurors in the trial of a cause in a court of record?

At the opening of the court the clerk must prepare bal-

lots, each bearing the name and address of a juror summoned by the proper officer, folded so as to conceal the names, and deposit them in a box. When any issue is brought on for trial the clerk must draw out of the box, without looking at them, a number of ballots, one after another, sufficient to form a jury, which is to consist of the twelve whose names are first called and approved as indifferent jurors. The ballots thus drawn are to be placed in a separate box until the jury is discharged, after which they are to be replaced in the general box. As each successive juror is called, he takes his seat in the jury box, unless challenged; and when the jury is fully made up, all the jurors are sworn in the usual form, "well and truly to try the issue between A B and C D, and a true verdict to give according to the evidence." 2 R. S. 420, 421; 2 Till. & S. Pr. 460, 461.

297. If a juror is called, but does not answer, or is set aside, what is done with the ballot bearing his name?

In such case, it must be folded up, and, as soon as the jury is sworn, replaced in the general jury box. 2 R. S. 421.

298. Would an unintentional deviation by the clerk from the prescribed mode of calling the jury, be sufficient ground of a motion for a new trial?

As the provisions of the statute are merely directory, it would not, unless a party has been actually prejudiced thereby. 2 Till. & S. Pr. 461.

299. What is done in case the panel is exhausted before the requisite number of jurors is obtained?

In such case, the court may direct the sheriff, or, if he is a party to the action, any other person, to summon jurors from the bystanders or others, from whom, after they are duly returned and sworn, a jury may be selected. And a jury may be either partly or wholly composed of persons thus summoned, who are called *talesmen*. 2 R. S. 421.

300. In what case will a special or struck jury be allowed by the court?

Only when it appears that a fair trial cannot be had without such a jury, or where the importance and intricacy of the

cause demands it. Such juries are practically obsolete in this State, as the courts do not esteem them to be conducive to the prompt and fair administration of justice. 2 Till. & S. Pr. 461; See 2 R. S. 418; 1 Burr. Pr. 440.

301. What is a foreign jury, and in what cases will it be granted?

A foreign jury is one drawn from a county other than that in which the trial is had, and it will not be granted except in extreme cases. The provision made by the Code for changing the place of trial, in a proper case, appears to remove all possible reason for retaining this proceeding in our present practice. 2 Till. & S. Pr. 462; Wait's Code, 151.

302. When is the proper time for challenges to be made to the jury?

On the appearance of a full jury, but not before, either party may challenge them, or any of them, for cause. 1 Burr. Pr. 454.

303. What is meant by a challenge to the array?

A challenge to the *array* is an objection to all the jurors returned by the sheriff collectively; and is founded on some partiality or default in the officer who summoned the jurors, or drew their names. A challenge to the array cannot be made after the jury has been impaneled and sworn. 1 Burr. Pr. 453, 454; 2 Till. & S. Pr. 462, 463.

304. What is meant by a challenge to the polls, and of how many classes do these challenges consist?

Each juror may be objected to on grounds personal to him. Such objections are called challenges to the polls. These challenges consist of three classes: 1. Challenges for principal cause; 2. Challenges for favor; 3. Peremptory challenges. 2 Till. & S. Pr. 463; 1 Burr. Pr. 454.

305. What is a challenge for principal cause?

A challenge for principal cause is one in which the reason assigned is so strong that, if the facts alleged are true, it necessarily follows that the juror is not fit to try the issue. 1 Burr. Pr. 454.

306. What is a challenge for favor ?

A challenge for favor is one in which the facts alleged establish only a probability that the juror may not be impartial in his judgment, and upon consideration of which the triers are at liberty to reject or admit the juror, according as they deem him impartial or not. 1 Burr. Pr. 454.

307. What is meant by a peremptory challenge ?

A *peremptory* challenge is the right which the law gives for setting aside a person without giving any reason whatever, except the will of the challenging party. 2 Wait's Law & Pr. 579.

308. Mention some of the grounds of principal challenge ?

Consanguinity to the ninth degree, affinity, interest in the event of the suit, or in a controversy which depends upon the same principles or evidence, are grounds of principal challenge. So, if a juror is in the employment of either party ; or is his tenant ; or has a law suit pending between himself and either party, of such a nature as to imply ill-feeling ; or has formed or expressed a positive opinion on the merits of the controversy. 2 Wait's Law & Pr. 600, 601 ; 2 Till. & S. Pr. 465.

309. Give some instances where the challenge can be for favor only ?

Among these are : Where the objection is that the juror is indebted to one of the parties ; or that he is his fellow-servant, or a member of the same club or society ; or is on terms of intimacy with him ; or that he is, by the nature of his business, likely to be often involved in controversies of the same nature ; or that he has a dispute of any kind with one of the parties ; or that he has expressed or formed a hypothetical opinion on the case. 2 Till. & S. Pr. 465 ; 2 Wait's Law & Pr. 601, 602.

310. In what manner must challenges be made ?

A challenge to the array must be made in writing ; but a challenge to the polls may be made orally. The *ground* of challenge must be stated, and it is not enough to say that it is

"for principal cause" or "for favor." 2 Wait's Law & Pr. 601, 602.

311. How must challenges to the polls for principal cause be tried.

They must always be tried by the court, and its decision thereon is reviewable upon exceptions. The mode of trial upon a challenge to the *array* lies in the discretion of the court. 2 Till. & S. Pr. 466.

312. How must challenges for favor be tried?

Prior to 1873 they were tried by triers, who consisted of the first two jurors allowed as impartial, and until two jurors were allowed, two impartial persons, and no more, were appointed by the court for the purpose, who were sworn well and truly to try whether the juror challenged was indifferent between the parties to the issue. As soon as one juror was admitted, he joined the two triers in trying the next, and as soon as two jurors were accepted they superseded the triers altogether and assumed their functions. 2 Till. & S. Pr. 466; 1 Burr. Pr. 455; 2 Shars. Bl. Com. 363. See 2 Wait's Law & Pr. 605. But, since the statute of 1873, all challenges are triable by the court.

313. Would exceptions lie to the decision of the triers?

No; nor to that of the court, when acting by consent in the place of triers, on a challenge for favor. But if the triers were instructed by the court as to the principles which should govern them, an exception would lie to the instructions of the judge, and to his decisions in regard to the admission of evidence for their guidance. 2 Till. & S. Pr. 467.

314. If the triers were in doubt as to the impartiality of the juror, how should they find?

In such case they should find him not impartial. 2 Till. & S. Pr. 467. The same principles are no doubt applicable to similar trials by the court.

315. To how many peremptory challenges is each party entitled?

Each party may make two peremptory challenges, without

any cause shown, and no more. A peremptory challenge waives all prior challenges to the same juror. 2 Till. & S. Pr. 467; 2 R. S. (5th ed.) 719.

316. Is it material as to which of the parties makes his challenge first?

It is not. But the challenges of the party who first challenged will be entitled to be first tried. In strictness, the party who makes the first challenge is bound to complete his challenges before the other party commences. But this rule cannot be so applied as to prevent both parties from having an opportunity of challenging either of the jurors called. 2 Wait's Law & Pr. 603; 1 Burr. Pr. 455.

317. Which of the parties to the action is entitled to begin, on the trial?

The party upon whom the affirmative of the issue lies is entitled to begin, and he may be compelled to begin against his will, although, in general, it is considered a *privilege* to be allowed to open the case. 2 Till. & S. Pr. 468; 2 Wait's Law & Pr. 606. As to which party holds the affirmative of the issue, see *post*, chapter on Evidence.

318. Assuming that the plaintiff is to begin, what is the first step to be taken by his counsel?

His counsel will proceed to open the case to the jury, stating the substance of the issue and the nature of the evidence which he expects to adduce; and he may state the nature of the defense, so far as it is necessary to show the precise issue. As soon as he has finished his address to the jury, he calls his witnesses, and, regularly speaking, he must exhaust all his testimony in support of the issue on his side before resting his case. 1 Burr. Pr. 234; 2 Wait's Law & Pr. 606, 607; 2 Till. & S. Pr. 471, 472.

319. After the plaintiff has rested his case, what steps are taken by the defendant?

After the plaintiff has put in his evidence and rested, the defendant, unless he moves for and obtains a nonsuit, or a dismissal of the complaint, states briefly the nature of the defense

to the jury, after which he calls his witnesses and goes through the same process with them as the plaintiff has done, subject to the same rules. 2 Till. & S. Pr. 471, 472; 2 Wait's Law & Pr. 608, 609. See Examination of Witnesses, *post*.

320. When are nonsuits said to be voluntary?

Nonsuits are voluntary where a plaintiff intentionally withdraws his action, when he is present in court, or where he intentionally omits to be present and answer to his action when it is called. 2 Wait's Law & Pr. 579.

321. When are nonsuits involuntary or compulsory?

They are *involuntary or compulsory* when they are granted against the wishes and consent of the plaintiff, and on motion of the defendant. 2 Wait's Law & Pr. 579; 2 Till. & S. Pr. 467-477.

322. When may the defendant's motion for a nonsuit be made?

A defendant may move for a nonsuit when the plaintiff rests, or he may give testimony and rest, and then move for a nonsuit; or he may move upon the whole evidence after both parties have rested. Wait's Code, 457.

323. When is it the duty of the court to nonsuit a plaintiff?

It is the duty of the court to nonsuit a plaintiff when the evidence will not authorize a jury to find a verdict for him, or where the court would set it aside, if so found, as contrary to evidence, or against the clear weight and effect of evidence. Wait's Code, 458.

324. Can the plaintiff be nonsuited on account of defects in his pleadings?

Technically speaking, he cannot. But, under the Code, the complaint may be dismissed on the trial, if it does not state a cause of action, and the distinction between a dismissal of the complaint and a nonsuit is, practically, merely a verbal one. 2 Till. & S. Pr. 480.

325. In what case may the plaintiff be allowed to withdraw a juror?

It sometimes happens that unexpected difficulties arise

upon the trial which makes it undesirable to proceed, and which are, nevertheless, not entirely fatal to the plaintiff's claim. In such case the judge may, in his sound discretion, whether with or without the consent of the defendant, allow the plaintiff to withdraw a juror, and order the cause to be retained upon the calendar. 2 Till. & S. Pr. 480.

326. What is the main purpose or object of the judge's charge to the jury?

It is to separate the questions of law from the matters of fact, and to present an impartial view of the whole case to the jury, so that they shall have a clear understanding of what they are called upon to decide, and the principles upon which they should act. 2 Till. & S. Pr. 482.

327. Is the judge bound to charge the jury without being requested to do so?

He is not; although it is an invariable practice for the judge to charge the jury without being requested. Wait's Code, 460.

328. After being charged by the judge, what then does the jury do?

They proceed to consult upon their verdict. This they may do in their box in court, but if they cannot agree at once they are sent out by the court in charge of an officer, who is sworn to keep them, without any intermission, refreshment, fire or light, other than such as may be allowed by the court, and without communication with any other person, until they agree upon their verdict. 2 Till. & S. Pr. 486.

329. May not the judge visit the jury during their retirement for consultation?

He may, if requested by the jury to do so, for the purpose of instructing them upon any question of law, provided he is accompanied by the counsel for all the parties. But the usual and more correct practice in such cases is to recall the jury into court, and there give them such instructions as they require, in the presence of counsel. 2 Till. & S. Pr. 486.

330. *Is it error for the court to permit the jury, when they retire for deliberation, to take with them documents and papers read on the trial?*

It is not; and though they have no right to do so, without permission, it seems that even their doing so would not affect the verdict. Nor will a verdict be set aside on account of the jury having taken with them a paper not given in evidence, if it is perfectly clear that it did not influence their verdict. 2 Till. & S. Pr. 487; Wait's Code, 462, 463.

331. *In what cases may the judge direct the jury to find a verdict in accordance with his views of the evidence?*

He may so direct the jury, where the undisputed evidence is all one way, or where there is such a preponderance of evidence one side that a verdict to the contrary would be set aside as against evidence. But unless the evidence is thus conclusive, the judge is not at liberty to give the jury a positive direction as to their verdict. Wait's Code, 460.

332. *Is a judge at liberty to keep a jury together until they shall agree upon a verdict?*

No; but he may detain them for so long a time as in his judgment there is any reasonable prospect of their agreeing. He has no right to threaten or intimidate them in order to affect their deliberations. Wait's Code, 462; 2 R. S. 554.

333. *May the jury decide upon a verdict by lot?*

No; they are not at liberty to adopt any mode of deciding upon their verdict, which avoids or abridges the exercise of their individual judgment. 2 Till. & S. Pr. 488.

334. *What is a verdict?*

A verdict is the opinion which is declared by a jury as to the truth of the matters of fact or law which are submitted to them for trial and decision. It is the unanimous determination of the jury, after hearing the case, the evidence, the arguments of counsel, and the charge of the court, if one is given. 2 Wait's Law & Pr. 623.

335. *What is the distinction between a "general" and a "special" verdict?*

A general verdict is that by which the jury pronounce

generally upon all or any of the issues, either in favor of the plaintiff or defendant. A *special* verdict is that by which the jury find the facts only, leaving the judgment to the court. Wait's Code, 464.

336. *In what case is a general verdict allowable?*

The court may allow a general verdict in any case; and such a verdict may be rendered by the jury, in their own discretion, without regard to the preference of the court, in every action for the recovery of money, or of specific real property. Wait's Code, 464.

337. *What is a sealed verdict?*

If the jury are unable to agree upon their verdict by the time the court adjourns, it is usual for the judge to direct the jury to render a sealed verdict. Where this is done, the jury agree upon their verdict, reduce it to writing, seal it up with care, and deliver it to the officer in charge of them, after which they may separate without waiting for the re-opening of court. 1 Burr. Pr. 242; 2 Till. & S. Pr. 491.

338. *Is a sealed verdict more binding upon the jurors than an oral one?*

It is not. Any of the jurors may change their minds before it is entered, and a single dissent nullifies it. And such a verdict, like an oral one, is of no force until received and entered by the court. 2 Till. & S. Pr. 492.

339. *How must the verdict be delivered?*

It must be delivered in open court by the foreman of the jury, in their presence; and this rule applies to a sealed verdict, as well as an oral one. Upon the announcement of the verdict by the foreman, any of the jury may dissent, and it is then no verdict. 2 Till. & S. Pr. 492.

340. *By whom and how is the verdict entered?*

It is the duty of the clerk to enter the verdict on the minutes of the court, together with any special findings of fact, and he reads it, as recorded, to the jury, calling upon them to hearken to their verdict as recorded by the court, and

adding, "and so say you all." This is the last opportunity for jurors to dissent. Wait's Code, 464, 469; Grah. Pr. 785.

341. When may the judge direct a verdict subject to the opinion of the court?

The judge may direct such verdict, when, upon a trial, the case presents only questions of law. The only tribunal to which a general verdict can be made subject is the general term. Wait's Code, 470, 475.

342. May a verdict, subject to the opinion of the court, be rendered by a judge trying a cause without a jury?

No. In jury trials only, can the finding be made subject to the opinion of the court. Wait's Code, 475.

343. What is the necessary effect of a verdict subject to the opinion of the court?

Its necessary effect (and that, without any formal order) is, to stay proceedings until the case can be heard at the general term, and meanwhile no judgment can be entered. Wait's Code, 476; 2 Till. & S. Pr. 499.

344. What is an exception, and why is it so called?

An *exception* is a formal objection to the decision of the court upon a question of law, and is so called, in order to distinguish it from a common objection, which is made for the purpose of raising a question for the court to decide upon the spot, rather than to procure a review of such decision. 2 Till. & S. Pr. 499; 1 Burr. Pr. 239, 240.

345. As a general rule, what may be excepted to?

As a general rule, any decision of the court upon a matter of strict legal right may be excepted to. Thus, an exception will lie where a challenge to a juror is improperly overruled, or to an erroneous refusal to appoint triers; to the admission of improper and prejudicial evidence, or exclusion of competent evidence; to an erroneous charge, or refusal to charge in accordance with a proper request. 1 Burr. Pr. 239, 240.

346. Can an exception be taken to a verdict?

No; for exceptions do not lie to errors of the jury.

Neither will an exception lie to any decision of the judge upon a matter discretionary with him ; nor to a mere expression of the judge's opinion as to the effect or weight of the evidence. 2 Till. & S. Pr. 500. See Wait's Code, 482.

347. By whom and when should an exception be taken ?

An objection or exception must be taken only by the individual as to whom it is valid. An objection must be taken at the first opportunity, and an exception taken immediately upon the objection being overruled. Thus, an objection to the admission of evidence must be raised at the moment when it is first offered, or, if its competency does not appear when thus offered, as soon as the ground of objection becomes apparent. 2 Till. & S. Pr. 501, 502 ; Wait's Code, 482 *h*.

348. In what form are exceptions required to be taken ?

Objections are taken verbally, but exceptions must be reduced to writing ; and they should be confined to the precise points which are objectionable. An objection or exception must be accompanied with a statement of the ground upon which it is made ; and it can be sustained upon no other ground than that thus specified. 2 R. S. 422 ; Wait's Code, 481, 482 ; 2 Till. & S. Pr. 502, 503.

349. How may an exception, valid when taken, be afterward obviated or cured ?

By subsequent events in the course of the trial. Thus, an exception to the admission of incompetent evidence is cured by the subsequent proof of the same state of facts on the part of the exceptant ; or by an express instruction from the court to disregard such evidence. So, the erroneous exclusion of evidence is cured by its subsequent admission at any stage of the trial. 2 Till. & S. 504 ; Wait's Code, 482.

350. Does the defendant, by cross-examination, lose the benefit of an exception duly taken ?

He does not. He has the right to test the correctness of testimony after exception. Wait's Code, 482.

351. *If the party to the action, against whom a verdict has been rendered, proposes to move for a new trial, what is the first step to be taken by him?*

He should make application to the court on the spot, as soon as the verdict is delivered, for such time as he may require to make a case or exceptions, and for a stay of proceedings, until the decision thereon. The court has power to grant the time and stay of proceedings, and usually does so, when it appears probable that it is asked in good faith. 2 Till. & S. Pr. 507.

352. *What class of actions are competent to be tried by the court, without a jury?*

All actions which seek equitable relief are competent to be so tried. But the court has the right to have the aid of a jury upon the trial, and to submit to its determination any question of fact presented by the pleadings, which may be deemed by it expedient. Wait's Code, 445.

353. *After the cause has been fully tried and submitted to the court, may the judge then order a reference to decide any of the issues?*

No ; he cannot order a reference after the trial ; neither can any other judge interfere in the decision of the cause. He must decide it himself. Wait's Code, 445.

354. *Where the cause is tried by the court without a jury, has the judge power to render a decision subject to the opinion of the general term?*

No ; that mode of proceeding is confined to jury trials. So, neither he, nor any other judge has power to stay the entry of judgment upon his decision. Wait's Code, 475.

355. *When must the decision of the judge who tries the cause be made?*

It must be made within twenty days after the court at which the trial took place. But a decision rendered after that period is perfectly valid, the provision of the Code as to time being directory merely. If no decision is rendered before the

judge's term of office expires, the whole trial falls through. Wait's Code, 478; 2 Till. & S. Pr. 509, 510.

356. What must be the form of the decision, and what must it contain?

The decision must be made in writing, and it must be signed by the judge who tried the cause, either with his name or his *allocatur*. It must declare what judgment is to be entered; and must contain a statement of the facts found, and the conclusions of the law separately, and if it contains no such statement, it is irregular. 2 Till. & S. Pr. 509, 510.

357. With whom, and within what time ought the decision to be filed?

It ought to be filed with the clerk, within twenty days after the adjournment of the court for the term. Wait's Code, 478.

358. Tell what a reference is, and describe the nature of the proceeding?

A reference is a substitute for trial in open court. One or more persons are appointed by the court to determine questions in litigation between the parties, and to report their conclusions to the court. If all the issues raised by the pleadings are referred, the proceeding is usually called a "reference of all the issues." If only a part of the issues or questions of fact not arising under the pleadings are referred, it is called an "interlocutory reference." Wait's Code, 488; 2 Till. & S. Pr. 516.

359. What issues are referable by consent of parties?

All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties. Wait's Code, 484.

360. In what cases may the court direct a reference without the consent of parties?

The court may, without the consent of parties, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of

law, direct a reference in the following cases: 1. Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or, 2. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect; or, 3. Where a question of fact, other than upon the pleadings, arises upon motion or otherwise in any stage of the action. Wait's Code, 485.

361. What is meant by a long account, such as will authorize the court to order a reference?

Properly speaking, an account is a statement of commercial or pecuniary transactions between two or more parties, accruing at various time. It has been held that a bill of *fifty* different articles delivered at one time is not an *account* at all; and neither is a single bill of lading, containing a number of items. Four items do not constitute a *long account*, nor yet seven items, where all the transactions occurred on one or two days. Wait's Code, 485; 2 Till. & S. Pr. 520.

362. Is an action of tort referable under the Code?

It is referable by consent equally with an action on contract; as, for example, an action upon a fraud. But such an action is not otherwise referable, as the right of the court to direct a reference, without the consent of all the parties, is limited to actions on contract which involve the examination of a long account. *Townsend v. Hendricks*, 40 How. 143; *Kain v. Delano*, 11 Abb. N. S. 29.

363. When is the proper time to make application for the order of reference?

Application for the order ought not to be made until the issue is joined, and the cause is ready for trial. If the action is not in readiness for trial, it is not referable. Wait's Code, 489.

364. What are the requisites of the motion papers upon which application for the order is made?

The motion must be made upon an affidavit showing that

issue is joined in law as well as fact, and this affidavit must be made by the party himself, unless some sufficient excuse is offered for not doing so. The place of trial need not be stated in the affidavit, nor need it allege that no difficult questions of law are involved. Wait's Code, 489, § 5.

365. Suppose an infant is a party, is a mere stipulation sufficient to sustain a reference?

It is not. In such case there must be an order of the court thereon. Wait's Code, 490, d; 2 Till. & S. Pr. 524.

366. Who are appointed referees, as a general rule?

It is usual to appoint them from among the counselors or clerks of the court. If facts are at issue requiring the judgment of an expert, one of the referees ought to be selected from that class. 2 Till. & S. Pr. 525.

367. Where must the referees reside?

Their residence must be in the same county in which the venue is laid. Wait's Code, 491.

368. How many referees may be appointed?

One, two or three referees may be appointed, but no more. A reference without consent to a greater number would be void. Wait's Code, 488; 2 Till. & S. Pr. 526.

369. In what manner are the referees selected?

Except where an infant or an absentee is a party, or in an action for divorce, the parties as to whom issues are joined may agree upon the referee or referees, by a written stipulation, and the reference must be made to the persons thus named and to no other. If such parties do not agree, the court may appoint one or more referees, not exceeding three, who are free from exception. But no one can be so appointed, to whom all parties in the action object, except in actions for divorce. 2 Till. & S. Pr. 526; Wait's Code, 488.

370. What power have referees to preserve order, and to compel the attendance of witnesses?

They have the same power to preserve order and punish all violations thereof upon a trial, and to compel the attend-

ance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or refusal to be sworn or testify, as is possessed by the court. Wait's Code, 486, 493, c.

371. *Have referees the power to allow amendments to the pleadings and summons?*

They have, either upon or without terms, as the court has upon a like trial. They have also the same power as the court itself, to grant adjournment. Wait's Code, 486, 493, c.

372. *Has a referee power to order a discovery or inspection of books or papers?*

He has not without special authority from the court. But such power may be conferred upon him by order of the court. Wait's Code, 497.

373. *Can a referee in any case delegate his authority to another?*

He cannot try a cause by deputy, nor when appointed to make a sale, can he empower another person to perform the duty. He may, however, employ another person to perform a mere mechanical operation, and he may employ an auctioneer or agent to effect a sale, reserving to himself the exercise of a suitable discretion. 2 Till. & S. Pr. 529.

374. *Can a referee be sworn as a witness in any proceeding had before him?*

No ; even though he has one or more co-referees. And it is the duty of referees to keep as free from outside influence, or the influence of the parties, as jurors. 2 Till. & S. Pr. 529 ; Wait's Code, 495.

375. *What control has the court over a reference.*

The reference is considered as a proceeding in the court, and the referees as officers of the court ; hence, the court has entire control over the proceeding until the report is filed, and may enlarge the powers of the referees, *may* enforce an adjournment of the reference, *may* compel the referee to proceed to the hearing, and *may* require from them a report of

each or any of their decisions with the reasons therefor. Wait's Code, 497 ; 2 R. S. 384.

376. *Which is the proper party to notice the cause for trial before the referees, and how and when is such notice to be given?*

Either party may notice the cause for trial, and such notice is to be given in the same time and manner as upon a trial by the court. Wait's Code, 486, 487.

377. *When more than one referee is appointed, is it necessary that all should meet together before any business can be transacted?*

It is. Even an adjournment cannot be ordered unless all are present. 2 R. S. 384 ; 2 Till. & S. Pr. 532.

378. *What is the general course of proceeding on trial by referees?*

A trial by referees is to be conducted in precisely the same manner as a trial by the court. The referees stand in place of both judge and jury, and they have the same discretion as to matters of practice upon the trial as a judge. Wait's Code, 486, 487, 495.

379. *Is it necessary that referees be sworn before entering upon their duties?*

It is so required by statute (2 R. S. 384), but by proceeding on the hearing without objection, the parties waive the point that the referees are not sworn. Wait's Code, 494.

380. *In what form must the final decisions of referees be made?*

It must be made in the form of a report to the court by which they were appointed ; and they are not bound by any oral decision which they may make. A report avowedly based upon the opinion of some other person than the referee himself, cannot be sustained. 2 Till. & S. Pr. 538.

381. *Within what time must the report of the referees be made?*

Referees are bound, unless otherwise ordered by the court

or stipulated by the parties, to make and deliver their report within sixty days from the time at which the action is finally submitted ; and in default thereof lose all right to their fees, and the action may proceed as if no reference had been ordered. 2 Till. & S. Pr. 539 ; Wait's Code, 488.

382. May exceptions be taken to the rulings of a referee?

They may, in the same cases, and the same manner, as to the rulings of a judge. Wait's Code, 486, 487.

383. What are sufficient reasons for setting aside the report of a referee?

The report of a referee will be set aside, if it can be made to appear that the referee was, even in the slightest degree, unduly influenced by the successful party ; or, if it is clear that an improper measure of damages has been adopted by the referee. So, if a referee unreasonably refuse an adjournment his report may be set aside. Wait's Code, 501.

384. Where and when should application be made to have the report of a referee set aside?

It is the correct and regular practice, where it is desired to have the report of a referee set aside, to make the application to the court which ordered the reference. The application must be made before the final judgment has been entered. Wait's Code, 501.

385. Is an attorney liable for the fees of a referee?

He is not ; and even where he has received money from his client to pay the fees of the referee, he cannot be attached for not doing so. Wait's Code, 503.

386. May referees be changed or removed in any case by the court?

The court which appointed a referee may remove him at any stage of the action, but will require a substantial reason for doing so. It will not remove him upon any ground of objection which was known to the party applying for such removal at the time of his original appointment, and not then stated. Nor will the referee always be discharged on his own application. 2 Till. & S. Pr. 545. See Wait's Code, 494.

387. Will the death of one of the plaintiffs, and the substitution of his successor in interest, pending a reference of the action, have the effect to supersede the order of reference?

It will not. Nor will the prior proceedings be thereby invalidated. On the death of a sole defendant the action abates, and the report of a referee made after that time is a nullity. Wait's Code, 497.

388. When does the jurisdiction of the referee terminate?

It terminates when he has made and delivered his report, unless an appeal is taken. If the parties appeal, he may be compelled, on the settlement of the case, to make new or further findings of fact on the request of either party. Rule 41, Sup. Ct.

389. State some of the cases where the courts will grant a "new trial?"

A new trial may be obtained on the following grounds: wrongful admission or rejection of evidence; misdirection of the judge; on account of the judge improperly nonsuiting the plaintiff; improperly discharging the jury; if a jurymen is sworn on the jury by a wrong surname; where the jury are interested in the question in dispute; if the verdict is perverse; where the verdict is against evidence; where the damages are excessive or too small; misconduct of the jury; misconduct of witnesses; and surprise. Chitty's Arch. Pr. 428; Tidd's Pr. 934-949; 3 Shars. Bl. Com. 387, *notes*; Wait's Code, 472-474.

390. What is meant by a "new trial?"

A new trial may be defined to be, a re-investigation of the facts and legal rights of the parties upon disputed facts, and either upon the same, or different or additional evidence, before a new jury, and probably, but not necessarily, before a different judge. 4 Chitty's Gen. Pr. 30.

391. To what cases are motions for new trials, on case or exceptions, restricted?

Such motions are restricted to cases in which verdicts have been rendered in trials before juries. And the case on which

the motion is made should show that the trial was by jury. Wait's Code, 470.

392. When are motions for new trials addressed to the discretion of the court?

Motions for new trials are addressed to the discretion of the court in all cases, unless made solely on exceptions, or on the ground of irregularity ; and even in such cases, in actions of an equitable nature. 2 Till. & S. Pr. 549.

393. Upon what grounds may a new trial be granted on motion, after a trial by a judge without a jury, or by a referee?

Upon the ground of surprise, newly-discovered evidence, irregularity, or misconduct of the judge or referee. But a motion for a new trial will not be heard after such trial, on the ground that the decision was against evidence or the weight of evidence, or that the judge or referee erred in any of his rulings. 2 Till. & S. 546, 547 ; Wait's Code, 481, 488.

394. When must the motion for a new trial be made?

It must be made before judgment is entered absolutely ; unless leave to make the motion afterward is specially given by the court. The motion must be made promptly, especially if based upon the ground of surprise. Wait's Code, 470.

395. Where there are no exceptions, or where the new trial is sought on a question of fact, at what term must the motion be heard in the first instance?

At special term. So, where there are exceptions, and the new trial is sought on questions of law only, unless there is an order that the exceptions be heard in the first instance at general term, the motion must be heard at special term. Wait's Code, 470.

396. In what case, if any, may a new trial be granted as to one of several defendants, leaving the verdict undisturbed as to the others?

This may be done, in a joint action of tort against several defendants, where all have united in the plea of the general issue. Wait's Code, 471.

397. *Will a new trial be granted in any case on account of an error which has clearly done no harm?*

No. The rule is, that where the court can see with certainty that upon the whole case substantial justice has been done, notwithstanding some of the proceedings have been erroneous, a new trial will not be granted. Wait's Code, 472, 473; 2 Till. & S. Pr. 549, 550.

398. *What is the rule in reference to granting a new trial, where a verdict is rendered against uncontradicted and unimpeached evidence?*

A verdict against such evidence must in every case be set aside, and a new trial granted; and a verdict *without* evidence is treated as if *against* evidence. 2 Till. & S. Pr. 553; Wait's Code, 473.

399. *In actions for penalties, is it sufficient ground for a new trial, that the verdict is against the weight of evidence?*

It is not, where the verdict is for the defendant; but if the verdict is in favor of the plaintiff the rule is otherwise. Wait's Code, 473.

400. *May the court grant a new trial where the damages are inadequate, as well as where they are excessive?*

It may, if the case be such as to clearly indicate that the jury have acted under the influence of partiality, bias or perverted judgment. Wait's Code, 473.

401. *What is meant by a motion for a new trial upon the judge's minutes, and upon what grounds may such a motion be entertained?*

By the provisions of the Code, the judge who tries a cause before a jury may, in his discretion, entertain a motion to be made on his minutes, to set aside the verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages. Wait's Code, 469.

402. *At what time only, can this motion be heard?*

It can be heard only at the same term or circuit at which the cause is tried, and it is usually made immediately after

the close of the trial, and in such case requires no previous notice. Wait's Code, 469; 2 Till. & S. Pr. 561.

403. Is it necessary to prepare any papers for the purposes of the motion?

It is not; but if the decision is appealed from, a case or exceptions must be settled in the usual form upon which the appeal is to be heard. Wait's Code, 469; 2 Till. & S. Pr. 561.

404. Upon what ground can a motion for a new trial be made upon affidavits alone?

Only on the ground of irregularity or surprise. The irregularities must be such as cannot be objected to at the trial. All questions that can be raised there must be and will be reviewed only upon a case or exceptions. 2 Till. & S. Pr. 563; Wait's Code, 840.

405. Are the affidavits of jurors admissible in any case for the purpose of setting aside their verdict?

The affidavits of jurors are not admissible to impeach their verdict for mistake or error in respect to the merits of the case, or for their own misconduct, or that of their fellows. But such affidavits are admissible to show that a mistake was made by the foreman, in delivering the verdict, or by the clerk in recording it; or to show that an error was made by the judge in his charge, or to prove an attempt on the part of the successful party to tamper with the jury. Wait's Code, 462; 2 Till. & S. Pr. 563.

406. In what case is it necessary to prepare a case or exceptions, or case containing exceptions, upon which to move for a new trial?

This must be done in every case, except where the new trial is moved for on the ground of irregularity or surprise, or the motion is made upon the judge's minutes. Wait's Code, 840.

407. Does any distinction exist between exceptions and a case, under the Code?

A distinction has at all times existed between *exceptions* and a *case*, and continues to exist under the Code. The

office of the former being confined to correcting errors in *law*, and the latter to correcting errors in *fact* as well as in law. A case is more comprehensive than exceptions, but is never proper, except where it is designed to review the finding of the jury upon the questions of fact. Monell's Pr. 718.

408. What is the usual office of a "case," where no exceptions have been taken?

It is to set aside the verdict of the jury, either as being founded upon insufficient evidence, or as being against the weight of evidence, or on account of the excessiveness or meagerness of the damages. All the rulings and decisions of the judge and his charge to the jury, or his refusal to charge in a particular way, may also be reviewed by a case. Monell's Pr. 718.

409. How should the case be prepared, and what should it contain?

The case must be drawn up, and should contain so much of the evidence and proceedings on the trial as can by any possibility have a bearing upon the questions raised on the motion. The pleadings should always be inserted in the *case*, if any question is likely to arise on them in connection with the evidence. The *exceptions* taken to the decision or charge of the judge should be invariably included. Wait's Code, 340, 841; 2 Till. & S. Pr. 565.

410. If it is desired to move for a new trial on exceptions only, what should they contain?

In such case they must contain no more of the evidence than is necessary to present the questions of law upon which they are founded; and it is the duty of the judge, upon settlement, to strike out all unnecessary matter. They must give, however, so much of the evidence, and such a statement of what occurred at the trial, as will make the point in question plain, and show upon what ground the decision excepted to was made. 2 Till. & S. Pr. 564, 565; Wait's Code, 842

411. Within what time, and in what manner may amendments be proposed to a case or exceptions?

The party served with a case or exceptions may, within

ten days thereafter, propose amendments thereto, by serving a copy thereof on the moving party. Wait's Code, 840.

412. In what manner is the case to be settled?

Within four days after service of the amendments, the moving party may serve on his opponent a notice that the papers will be submitted for settlement to the judge or referee before whom the case was tried, at a time and place to be specified in the notice, such time to be not less than four nor more than twenty days after service thereof. If no amendments are served, or no notice of settlement given, within the time prescribed, the case is deemed to be settled, in the former case, as proposed, and in the latter case, with the amendments as served. Wait's Code, 840, 841; 2 Till. & S. Pr. 566.

413. Within what time must a case or exceptions be filed, and what does it become after filing?

The party making a case or exceptions must file it with the clerk, within ten days after the settlement of the same. After filing, it becomes a record of the court, and may be taken *prima facie* in the further progress of the action, as evidence of the facts therein appearing. Wait's Code, 543.

414. What is an inquest, and to what actions is the practice of taking inquests applicable under the Code?

An inquest is a proceeding by which a cause is taken up out of its regular order by the plaintiff, and a trial had, in which no affirmative defense is admitted. Under the Code the practice is applicable only to actions for ordinary relief. Wait's Code, 837; 2 Till. & S. Pr. 448.

415. At what time may an inquest be taken?

An inquest may be taken at the opening of the court, on any day after the first day of the court; and it may be taken on the first day of the court where the cause is regularly called on the calendar on that day. An inquest cannot be taken after the trial of a litigated cause has been commenced, nor after the jury has been discharged for the circuit. Wait's Code, 452.

416. May the defendant in an action take an inquest?

No. The plaintiff only can take an inquest, even though

the action has assumed such a shape that the defendant has the affirmative of the issue, and the most interest in the prosecution of the suit. 2 Till. & S. Pr. 449.

417. In what cases may an inquest be taken against a portion only of the defendants?

An inquest may be taken against a part of the defendants when all are served with notice of trial and inquest, if the action is severable, as in the case of separate parties to a bill or note, sued together. And where some of the defendants fail to answer, an inquest may be taken against the rest. 2 Till. & S. Pr. 449.

418. What rights has the defendant, if any, on an inquest?

The defendant has a right to appear on the inquest and object to the plaintiff's evidence, except to the judge's ruling, and cross-examine the plaintiff's witnesses; but he cannot prove the defense by them, or examine them on his own behalf. If the plaintiff fails to make out his case he may be nonsuited. Wait's Code, 453.

419. How may the defendant prevent an inquest from being taken?

In order to prevent an inquest from being taken, it is necessary for the defendant to make, file and serve an *affidavit of merits*. A verified answer does not supply the place of an affidavit of merits for this purpose. Wait's Code, 451.

420. By whom should the affidavit of merits be made?

Generally, it should be made by the defendant himself, but, under certain circumstances, it may be made by his attorney or counsel, or his agent or *attorney in fact*, who is specially employed to defend the suit. In either case the attorney or agent who makes the affidavit must show an adequate excuse for its not being made by the party, such as absence beyond seas, or from the State, which is usually deemed sufficient. Wait's Code, 452.

421. If there are several defendants, is it necessary that they should all swear to merits?

It is, or otherwise an inquest may be taken against those

who do not, if it is a case in which separate trials may be had, unless they have a common ground of defense, in which case one of them may make the affidavit, stating that fact, and it will suffice for all. Wait's Code, 452; 2 Till. & S. Pr. 444.

422. What must the affidavit of merits contain in substance?

It must allege that the defendant has fully and fairly stated the case to his counsel, giving the name and residence of such counsel, and that he has a good and substantial defense on the merits thereof, as he is advised by his said counsel, after such statement made as aforesaid, and verily believes to be true. Wait's Code, 452.

423. What is the rule as to the filing and service of the affidavit of merits?

The affidavit must be filed, and a copy with a notice of the filing of the original served on the plaintiff's attorney, before the first day of the circuit, or at least before an inquest is actually taken. Wait's Code, 452.

424. Will the plaintiff be allowed to dispute the truth of the affidavit of merits, in order to sustain his right to an inquest?

As a general rule he will not; but if the affidavit is made by some one else than the defendant, he may show that the excuse assigned for its being so made was untrue. 2 Till. & S. Pr. 447.

425. When is the proper time for the affidavit to be made?

It may not be made before the complaint has been served or filed, or at least read by the defendant, for it is impossible that the defendant should know that he has a good defense, unless he knows the nature of the claim made against him. It may be made at any subsequent time prior to the time at which it is to be filed and served. 2 Till. & S. Pr. 443.

426. On the default or failure of the plaintiff to appear on the trial of a cause, what course may be pursued by the defendant?

He may move to dismiss the complaint, or for such judg-

ment as the case may require ; and one of several defendants, having a separate defense and having appeared separately, may take the plaintiff's default, notwithstanding the other defendants do not appear. Wait's Code, 450, 451.

427. In case the defendant fails to appear on the trial, what course may the plaintiff adopt ?

He may proceed with his case, which, however, he must prove by competent evidence, unless the defendant's answer contains no valid defense, or consists entirely of new matter, in which case the burden of proof is on the defendant, and therefore the plaintiff cannot be required to disprove it. Wait's Code, 450, 451 ; 2 Till. & S. Pr. 451.

428. Is it the usual practice for a jury to be impaneled in the cause, after a default ?

It is not. As a general rule no jury should be impaneled in the cause, in such case. 2 Till. & S. Pr. 451.

429. In general, what is the form of proceeding, in the trial of the cause after a default ?

If a jury is impaneled, the proceedings are similar to those upon ordinary trials by jury, except that they are carried on by one party only. If there is no jury the proceedings are, to the same extent, similar to those upon an ordinary trial of a question of fact by the court, and the decision must be rendered in like manner. 2 Till. & S. Pr. 451.

430. Upon what ground may an application be based for setting aside an inquest or default ?

An application of this nature is based either upon the ground of irregularity or of favor. As a general rule, the court will not relieve against a default, on the motion of any one not an actual party to the action and prejudiced by the default. And an inquest will not be set aside where the defendant appeared, cross-examined witnesses, and made a case. 2 Till. & S. Pr. 568. See Wait's Code, 435, 450.

431. *If, when the cause is called at the circuit, either party is unprepared to proceed with the trial, on account of the absence or sudden sickness of a material witness, what should be done?*

In such case the party so unprepared should make application to the judge for a postponement of the trial to a subsequent day or term. 1 Burr. Pr. 231, 232.

432. *Suppose that a party, while on his way to the trial, is arrested, is this sufficient reason for a postponement?*

It is; even when he is not a material witness, but not without the payment of costs. 2 Till. & S. Pr. 453.

433. *Is the absence of counsel for a party good ground for postponement?*

The unavoidable absence of *all* the counsel for a party is good ground for a postponement, but the absence of a *part* of the counsel engaged is not. In general, the absence of counsel, in order to justify a postponement to another term, must be caused by sickness, or some equally imperative necessity, and not merely by engagements in another court, though such engagements are usually received as an excuse for a few days' delay. 2 Till. & S. Pr. 453.

434. *When may the application for a postponement be made?*

It may be made to the judge at the circuit, and without notice to the adverse party. 1 Burr. Pr. 232, 423.

435. *By whom must the affidavit be sworn to, upon which the motion for a postponement is based?*

In general, it must be sworn to by one of the parties asking the postponement, but if none of them are within reach it may be made by their attorney, or by the managing clerk of the attorney, upon his stating in the affidavit that he has the management of the cause, and is particularly acquainted with its circumstances, but not otherwise. 2 Till. & S. Pr. 453, 454; Wait's Code, 455.

436. In case the application for a postponement is made on account of the absence of a witness, what is required to be shown in the affidavit?

1. That the witness is really material ; 2. That the applicant has been guilty of no neglect in securing his attendance ; and 3. That the witness can probably be had at the time to which the trial is deferred. 2 Till. & S. Pr. 454.

437. Upon what grounds may an application for postponement be successfully resisted ?

It may be so resisted on the ground of defects in the moving papers, or by showing that their statements are untrue, or by raising a suspicion as to the good faith of the application, or showing in any other way that the case is not a proper one for granting a postponement. 2 Till. & S. Pr. 455.

438. If the motion for a postponement is denied by the judge, upon insufficient reason, and the applicant is prejudiced thereby, what remedy has the latter ?

His only remedy in such case is by motion for a new trial. The error of the judge in refusing the application cannot be reviewed on an appeal from the judgment, for it cannot be made the subject of an exception. Wait's Code, 455.

439. What condition is usually imposed by the court, on granting the motion for a postponement ?

It is usual, on granting the motion, to impose as a condition, the payment of costs. And in some extreme cases, other terms have also been imposed. Thus, where the defendant was in failing health, he was required to stipulate that the action should not abate in case of his death, and this stipulation was enforced. 1 Burr. Pr. 423 ; 2 Till. & S. Pr. 456.

440. What are costs, and what does the term include, as used in the Code of Procedure ?

Costs, under the Code, are the sums allowed to a party to an action as an indemnity for his expenses in the action ; and the term generally includes disbursements of all kinds in the action, and not merely those fixed sums which are allowed as a compensation for the labor of the party or his attorney. Wait's Code, 583.

441. Upon what is the right of a party to costs dependent?

This right is wholly dependent upon the statute in force at the time of the decision under which costs are claimed ; and a party acquires no vested right to final costs during the pendency of the action. Final costs are regulated, however, by the statute in force when the verdict is rendered. 2 Till. & S. Pr. 581.

442. What is the distinction to be observed between final and interlocutory costs ?

Interlocutory costs are those which are allowed on special motion, on which an order is granted which decides some intervening matter relating to the cause, but not the cause itself. All other costs are final costs, to be collected under and with the judgment in the action. 2 Till. & S. Pr. 582.

443. What is the rule as to costs in actions in which the title of land is in question ?

On a recovery in such actions, full costs are allowed as of course to the successful party. Wait's Code, 598, 603.

444. What evidence only is admissible to show that the title to lands came in question at the trial ?

The only evidence that can be received as to whether or not the title to lands came in question at the trial, is the certificate of the judge who tried the cause, or a certified copy of the minutes. This is the rule unless the pleadings show the fact. Wait's Code, 599.

445. Which party will be allowed costs as of course, in an action for the possession of personal property ?

The successful party. But if the plaintiff recovers less than \$50 damages in such an action, he can recover no more costs than damages, unless he recovers property, or the possession of property is adjudged to him, the value of which, as assessed by the jury, court, or referee, by whom the action is tried, amounts, with the damages, to \$50. Wait's Code, 598, 603.

446. *If the plaintiff recovers property worth \$25, and only six cents damages, what amount of costs will he be entitled to recover, under the rule as just stated?*

He can only recover six cents costs; for the *damages* only, and not the value of the property, are to be the measure of costs in such a case. 2 Till. & S. Pr. 588; Wait's Code, 601.

447. *In an action for a personal injury, as for assault, battery, false imprisonment, malicious prosecution, libel, slander, crim. con., or seduction, what is the rule as to costs?*

They are allowed, as of course, to the successful party. But if the plaintiff in any such action recovers less than \$50 damages, he can recover no more costs than damages. Wait's Code, 598, 603.

448. *What is the rule as to costs, in actions of which a court of a justice of the peace has no jurisdiction?*

In this class of actions, the successful party is entitled to costs, as of course. Thus, where the plaintiffs commenced an action to recover \$500 for the transportation and storage of grain, to which was interposed by the defendants a counter-claim of more than that amount, for wastage and conversion, it was held, that where the plaintiff had a decision in his favor of but five cents, still he was entitled to costs. Wait's Code, 601.

449. *In an action for the recovery of money only, in which the plaintiff claims more than \$50, but recovers less, will he be entitled to costs?*

No. In such case he must pay costs, as a matter of course, and he cannot recover even his disbursements. And the fact that the plaintiff extinguishes a counter-claim exceeding \$50 does not entitle him to costs, if he does not recover more than \$50 clear. Wait's Code, 601; 2 Till. & S. Pr. 591.

450. *If several actions are brought on a single written instrument, for the same cause of action, against several parties who might have been joined as defendants in one action, can the plaintiff, when entitled to costs at all, recover full costs in all the actions?*

No. He can recover full costs in one action only, to be

selected by him ; and in the other actions he can recover only his disbursements. Wait's Code, 598, 602.

451. *An action was commenced for the possession of personal property of the value of \$200 ; the plaintiff had a verdict for part of the property, and the defendant for what remained, who should pay the costs ?*

Each party should pay costs to the other. So where there are several distinct causes of action stated in the complaint, on some of which the plaintiff, and on the others the defendant succeeds, each party is entitled to costs, if the action is one in which costs are a matter of right. Wait's Code, 600 ; 2 Till. & S. Pr. 592.

452. *Suppose there are several defendants, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, what is the rule as to costs ?*

In such cases the court may award costs to such defendants as have judgment in their favor, or any of them, whether the action be legal or equitable, for ordinary or special relief. Where the defendants are, however, *not* united in interest, or being so united, do not answer separately, or do not set up separate defenses, costs are a matter of course to such of them as succeed in an action for ordinary relief. 2 Till. & S. Pr. 593 ; Wait's Code, 604, 605.

453. *If a number of defendants appear by one attorney and succeed in the action, though putting in separate answers, will they be entitled to recover more than one bill of costs ?*

In such case, they can recover but one bill of costs, unless separate defenses are necessarily put in, in which case they should be allowed the costs of their several answers in addition to one general bill of costs, but not unless such separate answers are really necessary. Wait's Code, 605 ; 2 Till. & S. Pr. 593.

454. *In case the defendants appear by separate attorneys, in good faith, and put in separate defenses, and succeed, what is the rule as to costs?*

In such case each is entitled to a distinct bill of costs. A separate *demurrer* is a separate defense, as much as an answer. 2 Till. & S. Pr. 693 ; Wait's Code, 606.

455. *If there are several defendants, appearing by the same attorney, and the plaintiff recovers but one judgment, is he entitled to more than one bill of costs?*

He is not, however numerous the defendants, or the defenses, or the issues may be. And the rule is the same where the defendants first appear by different attorneys, but before judgment unite and employ the same attorney. Wait's Code, 606.

456. *If any of several defendants, jointly liable, makes no answer to the complaint, and the others defend the action, will the defendant in default escape liability for costs?*

He will not. He is still jointly liable with the other defendants for all the costs recovered by the plaintiff. Wait's Code, 606 ; 2 Till. & S. Pr. 594.

457. *In what class of actions may costs be allowed or not, in the discretion of the court?*

In actions of an equitable nature, as for example, actions to obtain an injunction. When the action is tried by a referee, the costs are in his discretion. 2 Till. & S. Pr. 595 ; Wait's Code, 432, 604.

458. *By what is the court guided in the exercise of its discretion in regard to costs?*

The discretion which the court exercises in regard to costs is guided by a general view of the equities of each particular case. 2 Till. & S. Pr. 596 ; 1 Van Sant. Eq. Pr. 587.

459. *As a general rule, which party is *prima facie* entitled to costs in actions of an equitable nature?*

The successful party, especially against a party whose conduct has been clearly wrongful. And it lies upon the

unsuccessful party in every case to show special reasons why he should not pay costs. 1 Van Sant. Eq. Pr. 588; 2 Till. & S. Pr. 596.

460. *If the plaintiff and defendant are both in fault, which party will be allowed costs?*

In such case, no costs will be allowed to either. And where both parties have been equally foolish or imprudent, even though not actually blamable, costs are refused. 1 Van Sant. Eq. Pr. 588.

461. *Give some instances in which a party, though successful, will be charged with costs?*

The successful party is sometimes charged with costs, when the proceedings of the other party have been induced by the erroneous statements of the former; and when relief is granted against a hard bargain, as unconscionable, though not fraudulent, it is usually granted upon payment of costs. A defendant, who is made a party without necessity, having been willing to do justice without a suit, should be allowed costs. 2 Till. & S. Pr. 599.

462. *What party should be allowed costs on a demurrer?*

Costs should always be allowed to the party succeeding on a demurrer, unless for very special reasons to the contrary. 2 Till. & S. Pr. 600.

463. *What is the rule as to costs upon a judgment of divorce?*

If the judgment be in favor of a wife, she should be allowed costs, but upon a similar judgment in favor of the husband, even for adultery, no costs are allowed, if the wife has no separate property. 2 Barb. Ch. Pr. 268.

464. *In an action of dower, what is the rule of costs?*

In such action, the plaintiff, if successful, should be allowed costs, in case she has demanded her dower of the defendant before suit and it has been refused, but not otherwise. Where a widow is a party defendant, her dower should be assigned to her without costs against her. Wait's Code, 607; 2 Till. & S. Pr. 600.

465. To whom and how are costs allowed in an action of interpleader?

Where this action is properly brought, it is almost a matter of course to allow the plaintiff his costs out of the funds; but, if the action was unnecessary, the plaintiff is not allowed costs. Wait's Code, 605, *j.*

466. What is the rule in mortgage cases?

A mortgagee is, in general, allowed his costs, whether as a plaintiff in an action of foreclosure or as a defendant in an action to redeem, and this notwithstanding he claims more than is due. Costs are in like manner allowed to all persons claiming under him, and necessarily made parties to such action. 2 Till. & S. Pr. 602.

467. In what cases will costs be denied the mortgagee?

Costs will be denied him in all cases where he has acted oppressively and unfairly. The rule, as stated in the last answer, is confined to cases in which the mortgagee acts as such, and in a reasonable manner. 2 Van Sant. Eq. Pr. 117.

468. When will the mortgagee be charged with costs?

He will be charged with costs if the mortgage has been actually satisfied before the action to redeem is commenced, or if a tender of the amount due has been in like season made and kept good, or if he has refused to inform the mortgagor, or those claiming under him, what amount is due, and has asserted his own absolute title to the property. 2 Van Sant. Eq. Pr. 117; 2 Till. & S. Pr. 603.

469. What is the rule as to costs in actions for partition?

In cases of actual partition, the aggregate amount of costs of the several parties is to be apportioned and charged upon the parties to the proceedings, according to their respective rights and interests in the premises; and the parties, whose taxed bills exceed their ratable proportions of the whole costs, are entitled to executions against those whose taxed bills are less. Costs incurred by unnecessary proceedings in the action, as by unfounded claims, or by bringing in unnecessary parties,

must be borne exclusively by the party in fault. 2 Till. & S. Pr. 603; 2 Van Sant. Eq. Pr. 66, 67; Wait's Code, 605, *h.*

470. *Upon what general principle is the allowance of costs regulated, in actions against trustees for an accounting or other special relief?*

They are to be allowed their costs for proceedings not made necessary by their fault, and charged with the costs of such inquiries and proceedings as are made necessary by their breach of trust. 2 Till. & S. Pr. 605; 1 Van Sant. Eq. Pr. 589, 590.

471. *In case the terms of a will are so ambiguous as to render it proper to bring an action to settle its construction, in what manner should the costs of the parties be paid?*

In such case, the costs of the necessary parties to the litigation are a proper charge upon the estate; and especially where such parties are infants, lunatics or idiots, etc. 1 Van Sant. Eq. Pr. 592.

472. *Is the rule embodied in the last answer applicable to cases where difficulties arise upon the construction of deeds?*

It seems not; and a suit between claimants under a will, and other claimants under a deed of the testator, inconsistent therewith, is not within the rule, and the costs cannot be charged to the estate. 1 Van Sant. Eq. Pr. 592; 2 Till. & S. Pr. 606.

473. *What is the rule of the Code as to the costs on a motion?*

Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding \$10, and may be absolute or directed to abide the event of the action. Wait's Code, 628.

474. *What is meant by the costs of a motion being allowed as "costs in the cause?"*

It means that they are to be added to the costs on judgment, if the party to whom they are granted recovers final costs, or deducted from such costs, if the other party is finally successful. 2 Till. & S. Pr. 632.

475. What are we to understand by the costs of a motion being “directed to abide the event of the action?”

That they are to be allowed as costs in the cause to the party finally successful in the action, unless they are given only to a specified party, in which case, if he fails in the action, no one gets them. 2 Till. & S. Pr. 632.

476. Will any costs be allowed on ex parte motions?

No. It is an apparently inflexible rule that no costs can be allowed on *ex parte* motions, which, of course, includes all motions in an action in which the defendant has not appeared. 2 Till. & S. Pr. 633.

477. If no costs are asked for in the notice of motion, will any be granted?

No. If costs are not claimed, either in the notice or upon the argument, none are allowed. Wait's Code, 629.

478. If a motion is unnecessarily made, for the mere purpose of obtaining costs, will any be allowed?

No; and where several motions are made upon facts which could be presented in a single set of papers, costs of one motion only are allowed, though different sets of papers are used, and though the motions are made in different causes brought by the same plaintiff against different defendants. Wait's Code, 630; 2 Till. & S. Pr. 635.

479. What is the rule as to costs on motion for a new trial?

On a motion for a new trial, upon a case or exceptions, it is discretionary with the court to grant or refuse costs; but it is usual to order them to abide the event of the action. If a new trial is granted as a matter of favor, it is usual to impose the payment of costs as a condition. 2 Till. & S. Pr. 639; Wait's Code, 476.

480. What is the rule in cases of amending pleadings?

The rule in all such cases is that the amendment shall not be made at the expense of the opposite party, and that he must be indemnified for all additional expense involved in such amendment. 2 Till. & S. Pr. 642.

481. What is meant by "double" or "treble" costs?

By double or treble costs are meant, not double or treble the *single* costs; but *double* costs consist of the single costs, and half of the single costs; and *treble* costs consist of the single costs, half of the single costs, and half of that half. 1 Burr. Pr. 276. See *Walker v. Burnham*, 7 How. 55.

482. In what cases are double costs allowed?

Double costs are allowed upon a judgment rendered for the defendant upon verdict, demurrer, nonsuit, discontinuance or otherwise, in actions: 1. Against public officers of this State, or any person specially and duly appointed to execute the duties of such an office, concerning any act done by him by virtue of his office, or for any omission of official duty; 2. Against any other person, for doing any act concerning the duties of such officer, by his command or in his aid; 3. Against any person, for taking any distress, making any sale, or doing any other act by authority of any statute of this State. 2 R. S. 617.

483. In what cases are treble costs allowed?

They are allowed in certain cases by special statutes, as, for example, to officers sued for an act done under the militia laws. See 1 R. S. 324.

484. Do the statutes which allow double and treble costs, in certain cases, apply to any equitable actions?

They do not, and in such actions neither double nor treble costs can be allowed. 2 Till. & S. Pr. 615.

485. How may a defendant, who would otherwise be entitled to double costs, lose his right thereto?

By joining in an answer with another defendant who is not within the statute. 2 Till. & S. Pr. 616.

486. When are costs on appeals discretionary with the appellate court?

In those actions or proceedings, the costs of which are discretionary with the court below, the appellate court has the like discretion. And, in all actions, the costs of an appeal

are in the discretion of the court whenever a new trial is ordered, or when a judgment is reversed in part only. In other cases than those mentioned, the party in whose favor the appeal is decided has an absolute right to costs. Wait's Code, 604; 2 Till. & S. Pr. 646.

487. Is a respondent, who was entitled to double costs in the court below, entitled to double costs of the appeal?

He is, on the judgment being affirmed. But a successful appellant cannot recover double costs. Therefore, where an officer, sued for his acts, as such, appeals from a judgment against him, and such judgment is reversed, and an appeal being taken from the decision of the appellate court, it is affirmed, he recovers double costs on the latter appeal, and single costs only on the former. 2 Till & S. Pr. 648, 649.

488. What is the general rule as to the liability of trustees for costs?

In actions prosecuted by or against trustees of an express trust, costs awarded against them are chargeable only on the property or persons that they represent, and not against such trustees personally, unless directed by the court to be paid by them personally for mismanagement or bad faith in the action or defense. Wait's Code, 630.

489. State in what way a trustee of any kind may render himself personally liable for costs?

A trustee must show by his complaint that he sues as such, or he will be personally liable for costs; and that without any special order on the subject. So a receiver is personally liable for costs if he brings an action without leave of the court by which he was appointed. It is not necessary, however, that he should state the fact of leave granted in his complaint. Wait's Code, 632; 2 Till. & S. Pr. 662.

490. In what way only can costs be charged against a trustee in any case?

In no case can costs be charged against a trustee, whether plaintiff or defendant, without an express order of the court. A judgment for costs against a trustee, entered without special

leave, will be set aside as irregular. 2 Till. & S. Pr. 662 ; Wait's Code, 635.

491. *A written promise was given to pay a specified sum to "the estate of 'A,' deceased." On this instrument the executors, as such, commenced an action and failed to recover costs. Are they personally liable for the costs?*

They are, and that without notice. They should have brought the action in person, the deceased being dead before the promise was given. Wait's Code, 632, *f.*

492. *What must be established by the plaintiff in an action, in order to charge an executor defendant with costs?*

In order that the plaintiff may do this, he must establish to the satisfaction of the court: 1. That the demand was unreasonably neglected ; or, 2. That it was unreasonably resisted ; or, 3. That the defendant refused to refer the matter in controversy to three disinterested persons, pursuant to the provisions of the Revised Statutes. 2 R. S. 90, § 11 ; Wait's Code, 631.

493. *Does this provision of the Revised Statutes extend to equitable actions under the Code?*

No. The Code leaves the costs in such actions entirely to the discretion of the court. And it has been held that the provision does not apply to actions commenced against persons in their life-time and revived after their decease against their legal representatives. Wait's Code, 633 ; 2 Till. & S. Pr. 664.

494. *If costs are adjudged against an infant plaintiff, how may the payment of them be enforced?*

When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action is responsible therefor, and payment may be enforced by attachment. Nor is it necessary for an order of the court to first bring the guardian into contempt, before the attachment can issue. Wait's Code, 630.

495. Is the guardian responsible for costs after the infant becomes of age?

He is not, unless the infant elects to abandon the action, and applies for a reference to determine whether it was commenced in good faith and for his benefit, and on such reference it is determined that the action was improperly brought. 2 Till. & S. Pr. 668.

496. What is the rule as to the liability of the people for costs, in civil actions prosecuted in their name?

In all civil actions prosecuted in the name of the people of this State, by an officer only authorized for that purpose, the people are liable for costs in the same cases and to the same extent as private parties. If a private person is joined with the people as plaintiff, he is liable in the first instance for the defendant's costs ; which cannot be recovered of the people till after execution issued therefor against such private party and returned unsatisfied. In an action prosecuted in the name of the people of this State, for the recovery of money or property, or to establish a right or claim, for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the people. Wait's Code, 636, 637.

497. Suppose the cause of action, after action brought, becomes by assignment, or in any other manner, the property of a person not a party to the action, is such person liable for the costs?

He is, in the same manner as if he were a party, and payment thereof may be enforced by attachment. Such person is not liable for costs, however, unless he would have been liable had the action been commenced by him. Wait's Code, 637.

498. In what cases are attorneys liable for costs?

The attorney for a plaintiff who is not a resident of this State at the commencement of the action, or who, for any other reason, is bound to give security for costs, is himself liable to the defendant for costs, to the extent of \$100, until security for costs is filed pursuant to the statute. 2 R. S. 620,

§§ 7, 8. So an attorney who commences an action without authority will be compelled to pay the defendant's costs. 2 Till. & S. Pr. 671.

499. *What is the general rule as to costs, on the discontinuance of an action?*

As a general rule the plaintiff will be required to pay costs upon discontinuing. If the object of the action is defeated by the plaintiff's own act or procurement, he cannot be permitted to discontinue without costs. Wait's Code, 639.

500. *Give some instances in which the plaintiff will be allowed to discontinue without costs?*

If, after the commencement of the action, the defendant is sentenced to the State prison, or is discharged from his debts under an insolvent or bankrupt law, or is discharged from imprisonment for his debts under an insolvency act, the plaintiff will be allowed to discontinue without costs, no matter what may be the form of the action, and notwithstanding the defendant offers to stipulate not to plead the discharge. Wait's Code, 639 ; 2 Till. & S. Pr. 659.

501. *Is the mere fact of the defendant's insolvency sufficient ground for allowing a discontinuance without costs?*

It is not. The defendant must be actually discharged under a statute. But if an order for the discharge of the defendant has been obtained, although the discharge itself is not yet actually made out, that is sufficient ground for the application. 2 Till. & S. Pr. 659.

502. *Will the plaintiff be allowed to discontinue without costs, on the ground of the defendant's insolvency, when the latter was discharged before the commencement of the action?*

He will not, unless the plaintiff shows clearly that he had no information of such discharge until after the action was commenced. On the same principle, if the plaintiff proceeds in the action after information of the defendant's discharge, he must pay the costs thereby accruing. 2 Till. & S. Pr. 659.

503. In what cases will an executor or administrator, suing as such, be allowed to discontinue without costs?

If an executor or administrator, as such, commences a wrong action by mistake, or finds that the action is useless, he will be allowed to discontinue without costs, unless he has acted in bad faith, which will not be presumed. And the same rule extends to any other trustee suing as such. 2 Till. & S. Pr. 660 ; Wait's Code, 639.

504. By whom are costs adjusted?

Final costs are to be adjusted by the clerk of the court in which the action is pending. In the supreme court the clerk of the trial county is the proper officer. Costs in any interlocutory proceeding may be adjusted by the judge before whom such proceeding was had, or the court in which the same is pending, or in such other manner as such judge or court may direct. Wait's Code, 621, 802.

505. What notice is required to be given on the adjustment of costs?

Notice of such adjustment must be given by the prevailing party to the adverse party, in the same manner that other notices are served, except that five days' notice only is required, and, if the attorneys for all the parties reside in the same city, village or town, only two days' notice. Wait's Code, 621.

506. What must be served with the notice of adjustment?

There must be served with the notice of adjustment, a copy of the items of costs and disbursements claimed, which should be in substance a duplicate of the bill of costs. Wait's Code, 621.

507. What is the effect of omitting to give due notice of adjustment of costs?

The effect of such an omission is to render the adjustment irregular, and it will be set aside on motion. The judgment will, however, be allowed to stand, but there must be a retaxation and adjustment at the cost of the party who should have given notice. Wait's Code, 624.

508. What should the bill of costs contain?

The bill of costs should properly contain all the items taxed, in detail, including disbursements for witnesses, as well as for any other purpose. The name of each witness should be stated separately, and the number of miles traveled by him, if travel fees are charged. 2 Till. & S. Pr. 675.

509. What must be shown in the affidavit of attendance of witnesses, in order that a party may be allowed to tax witness fees in his costs?

Such affidavit must show the name and place of residence of each witness, the distance they resided from the place of trial by the usually traveled route, the number of miles actually traveled, going and returning, and that the party believed them to be material and necessary witnesses. It must positively and directly aver that each of them actually attended the trial, stating the number of days, and giving the dates on which he actually attended. If some of the witnesses are not called, a good reason should be given, or their expenses should be disallowed. 2 Till. & S. Pr. 676; Wait's Code, 623.

510. Can disbursements made in an action be recovered, where costs cannot?

No; costs include disbursements. Wait's Code, 622.

511. In what way may a review of the adjustment of costs be obtained?

The only way in which such review may be had is, by motion at special term, to correct or set aside the adjustment. Wait's Code, 626.

512. By what rules are the costs on this motion governed?

The costs of this motion, and of appeals from the order thereon, are the same as on ordinary motions, and governed by the same rules. Wait's Code, 626; 2 Till. & S. Pr. 680.

513. What is a judgment?

A judgment is the final determination of the rights of the parties in the action. Wait's Code, 428, § 245.

514. *Can there be an interlocutory judgment since the Code?*

There cannot. The only judgment authorized or permitted by the Code, is a final determination of the rights of the parties to the action. Every other direction of a court or judge, made or entered in writing, is an order. Wait's Code, 427, note b; id. 757, § 400.

515. *State generally, what relief may be awarded to a plaintiff upon the rendition of judgment?*

The relief granted to the plaintiff, if there be no answer, cannot exceed that demanded in the complaint; but, in any other case, the court may grant any relief consistent with the case made by the complaint, and embraced within the issues. Wait's Code, 516, § 275.

516. *If a plaintiff bring his action for equitable relief alone, without alleging any thing in his complaint entitling him to legal redress or damages, and failing to substantiate his right to equitable relief, proves facts showing a right to damages in an action at law, can the court render a judgment in his favor, awarding him such damages?*

It cannot. Such relief would not be consistent with the case made by the complaint. Wait's Code, 518, note d.

517. *Will the mere fact, that a plaintiff in his complaint asks for relief inconsistent with the facts alleged and proved, entitle the adverse party to a dismissal of the complaint?*

It will not. If the case which the plaintiff states entitles him to any remedy, whether legal or equitable, his complaint is not to be dismissed, because he has prayed for a judgment to which he is not entitled. Wait's Code, 517.

518. *In what cases may judgment be entered by the clerk, without the direction of the court?*

Judgment may be entered by the clerk, without the direction of the court, in actions to recover a money demand for a sum certain, and in such actions only. Wait's Code, 429, note e.

519. *What are the proceedings necessary to perfect a judgment on failure to answer an unverified complaint?*

The plaintiff should first file proof of personal service of the summons and complaint or of the summons, according to the provisions of section 130 of the Code, and that no answer has been received. If the action is on an instrument for the payment of money only, it is the duty of the clerk, on its production to him, to assess the amount due to the plaintiff thereon. In other cases, the clerk must ascertain the amount which the plaintiff is entitled to recover in the action from his examination under oath, or other proof, and enter judgment accordingly. Wait's Code, 428, § 246.

520. *In what cases is the defendant entitled to notice of the time and place of the assessment of damages by the clerk?*

A notice of the assessment by the clerk is necessary only where the complaint is unverified and the defendant has given notice of appearance. Wait's Code, 428, § 248; id. 429, notes *a, d, g.*

521. *To whom should the plaintiff apply for judgment on failure of the defendant to answer, in actions not arising on contract for the payment of money only?*

The plaintiff must apply to the court for the relief demanded in the complaint in all actions not arising on contract for the payment of money only. Wait's Code, 429, note *e.*

522. *What advantage does the defendant derive from the service of a notice of appearance before the time for answering has expired, where judgment cannot be taken on failure to answer without application to the court?*

The service of a notice of appearance before the time for answering has expired, entitles the defendant to eight days' notice of the time and place of application to the court for the relief demanded in the complaint. Wait's Code, 428, § 246.

523. *What proof is necessary to satisfy the court that the plaintiff is entitled to judgment?*

1. Proof of personal service of summons, or of summons

and complaint, and of non-service of answer; 2. Proof of the plaintiff's claim if the complaint was unverified, and like proof in other cases if required by the court. Wait's Code, 428, § 246; 2 Till. & S. Pr. 257.

524. *How are damages assessed in actions for the recovery of money only, or of specific real or personal property, with damages for the withholding of the same?*

The court may order the damages assessed by a jury, or if the examination of a long account be involved, by a reference. Wait's Code, 428, § 246.

525. *State generally the course of proceeding on an inquest?*

The proceedings on the assessment of damages before a sheriff's jury on default of answer are regulated by the former practice, and are conducted in substantially the same manner as a trial in court. The sheriff, under sheriff, or deputy conducts the inquest. The cause of action being admitted by the default cannot be proved or disproved, nor can a partial defense be proved. The only question for the jury is the amount of damages; and the defendant may prove any matter in mitigation of damages and may call witnesses for that purpose. The rules of evidence are the same as upon an ordinary trial. The jury, after deliberating and agreeing upon their verdict, should sign and seal the inquisition, and the sheriff should indorse his return upon the writ or order. 2 Till. & S. Pr. 264-267; Wait's Code, 433, note s.

526. *What proof is required by the court on an application for judgment on failure of the defendant to answer, where the summons was served by publication?*

The plaintiff must furnish due proof of the service of the summons in conformity to the order for publication; must prove the demand mentioned in the complaint, and if the defendant is a non-resident, the plaintiff must state under oath whether any, or what payments have been made to him or to any one for his use on account of such demand; and in actions for the recovery of money only the plaintiff must show by affidavit, that an attachment has been issued in the action

and levied upon property belonging to the defendant. 1 Wait's Pr. 546, 547; 2 Till. & S. Pr. 270, 271; Wait's Code, 428, 429, § 246; id. 836; Rule 34, Sup. Ct.

527. What security is required of the plaintiff before judgment is entered in his favor, where the summons is served by publication?

In actions for the recovery of money only where the summons has been served by publication, no judgment can be entered unless the plaintiff, at the time of making the application for judgment, shall produce and file with the clerk an undertaking, for not less than the amount of the judgment, with two sureties to be approved by the court, that the plaintiff will abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply, and be admitted to defend the action, and succeed in such defense. Wait's Code, 836; id. 429, § 246; Rule 34, Sup. Ct.

528. What class of actions are comprehended in the general phrase "actions arising on contract for the recovery of money only?"

By "actions arising on contract for the recovery of money only" are intended all actions for *debt*, as distinguished from actions for damages, for special relief, or for specific property; or, in other words, such actions as are founded upon contracts which, by their terms, require the payment of money only. 2 Till. & S. 252.

529. How would you proceed if the defendant did not deny any part of your client's claim as set up in the complaint, but set up in his answer a counter-claim amounting to less than such claim?

If the counter-claim so urged was wholly unfounded, or excessive in amount, the only course would be to proceed to trial. But if the defendant's claim was a valid one, the proper course would be to file with the clerk a statement admitting the counter-claim, and to take judgment for the excess of the

plaintiff's demand over that of the defendant. Wait's Code, 428, § 246; 2 Wait's Pr. 519.

530. In what cases may a defendant move for judgment upon an answer?

If the answer contains a statement of new matter constituting a counter-claim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued. Wait's Code, 279, § 154; 2 Wait's Pr. 520.

531. For what purposes and in what cases may a judgment by confession be entered without action?

A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant or both. Wait's Code, 726, § 382.

532. What statement is required on the part of the defendant before judgment by confession can be entered?

Before a judgment by confession can be entered, the defendant must make, sign and swear to a written statement to the following effect: 1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor; 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due; 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same. Wait's Code, 727, § 383.

533. In what manner is a judgment entered upon this statement?

On the filing of the statement with a county clerk, or with a clerk of the superior court of the city of New York, the clerk indorses upon it a judgment for the amount confessed, with \$5 costs, together with disbursements, and enters the

same in the judgment-book. The judgment so entered thereupon becomes a judgment of the supreme or superior court, as the case may be, and the statement and affidavit, with the judgment indorsed, becomes the judgment-roll. Wait's Code, 731, § 384.

534. In what manner is a justice's judgment made a judgment of the county court?

The Code makes it the duty of a justice of the peace to give a transcript to any party in whose favor he has rendered judgment, and when this transcript is filed and docketed in the office of the clerk of the county in which the judgment was rendered, the judgment thereupon becomes a judgment of the county court. A certified transcript of this judgment may be filed and docketed in the clerk's office of any other county with the like effect, in every respect, as in the county where the judgment was rendered, except that it is a lien only from the time of filing and docketing the transcript. Wait's Code, 77, § 63.

535. A brought an action against B, C and D, to recover damages for the breach of a contract alleged to have been made by the three defendants jointly. Upon the trial, it appeared that B only was liable upon the contract, and that C and D were not liable. The breach of contract being established, how should judgment be rendered in the action?

The complaint should be dismissed as to C and D, and judgment rendered against B under the provision of the Code, allowing judgment to be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. Wait's Code, 510, note b.

536. What was the rule in such cases at common law?

It was well settled at common law, prior to the Code, that, in an action against several defendants on an alleged joint contract, no recovery could be had against any of them, unless a joint contract, made by all of them, was established. The object of section 274 of the Code was to abrogate this rule. Wait's Code, 510, note b.

537. What judgment may be rendered against a married woman?

Judgment may be rendered against a married woman for costs as well as for damages, or both for costs and for damages, in the same manner as against other persons; but, it must be expressly stated in the judgment, that the amount is to be levied or collected out of her separate estate, and not otherwise. Wait's Code, 509, 516.

538. Does the clause of the Code providing, that the judgment may grant to the defendant any affirmative relief to which he may be entitled, authorize the granting of any affirmative relief not authorized by the pleadings and not prayed for by the answer?

It does not. Judgment cannot be given to the defendant for a cause of action not set up by way of defense or counter-claim. Wait's Code, 513, note b.

539. What judgment may be rendered in an action for the recovery of personal property?

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant must be in the alternative, for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. Wait's Code, 519.

540. What constitutes a judgment roll?

Where no answer to the complaint has been served the judgment roll will consist of the summons and complaint or copies thereof, proof of service and that no answer has been received, the report, if any, and a copy of the judgment. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the

judgment, must be attached together and filed as a judgment roll. Wait's Code, § 281.

541. Whose duty is it to make up the judgment roll?

It is strictly the duty of the clerk to make up the judgment roll as it is optional with the successful party to furnish the roll or not. It is customary, however, for the attorney of the prevailing party to furnish a judgment roll. Wait's Code, 522, note *a*.

542. Can a judge at chambers render a judgment?

There is only one case in which a judge at chambers can render a judgment, and that is under section 247 of the Code, where judgment is given on a frivolous demurrer, answer or reply. In all other cases, judgment can be rendered only by the court when sitting as such. Wait's Code, 520, note *a*.

543. When, and upon what authority, may judgment be entered on a trial of a question of law or fact by the court?

The sole authority for entering up judgment after a trial of an issue of law or fact is the written decision of the judge, which must be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision must be entered accordingly, four days thereafter. Wait's Code, 478, § 267; id. 479, note *k*.

544. When, and upon what authority, may judgment be entered upon a trial of the whole issue by a referee?

The report of a referee upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court, viz.: by the clerk on the filing of the report. Wait's Code, 487, 503, note *i*.

545. How only may the lien of a judgment be secured?

The lien of a judgment can be secured only by docketing it in conformity to the statute. 2 Till. & S. 716.

546. What is a docket?

A docket is a book in which the clerk enters the names of all the parties to the judgment, the amount of the debt,

damages or other sum of money recovered, with the costs, and the hour and day of entering such docket. If the judgment is against several persons, this statement must be repeated under the name of each person against whom the judgment was recovered, in the alphabetical order of their names respectively. 2 Till. & S. 716.

547. What judgments may be docketed?

The Code authorizes the docketing of such judgments only as direct, in whole or in part, the payment of money. Wait's Code, 523, § 282.

548. What is the test of the right to docket a judgment?

The test of the right to docket a judgment is the right to issue an execution upon it immediately. Wait's Code, 524, note a.

549. Within what time must a motion to set aside a judgment be made?

A motion to set aside a judgment on the ground of irregularity must be made within one year; but a motion to set aside a void judgment may be made at any time, and is not barred by the lapse of time. Wait's Code, 525, note a.

550. Within what time, and in what cases, may the court vacate a judgment as a matter of favor?

Section 174 of the Code provides that the court may, in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment taken against him through his mistake, inadvertance, surprise or excusable neglect. Wait's Code, 332.

551. When and in what cases will the court open a judgment, in an action commenced by the publication of a summons?

A defendant, against whom publication is ordered, or his representatives, may, on application and good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, in all cases except in actions for divorce. Wait's Code, 171, § 135.

552. How many kinds of execution are there?

There are three kinds of execution, one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. Wait's Code, 532, § 286.

553. What judgments may be enforced by execution?

Judgments requiring the payment of money or the delivery of real or personal property, and such only, may be enforced by execution. Wait's Code, 531, § 285.

554. How must a judgment, requiring the performance of any act other than the payment of money or the delivery of real or personal property, be enforced?

A judgment, requiring the performance of any act other than those specified, is enforced by first serving a certified copy of the same upon the party against whom it is given, or the person or officer who is required by the judgment or by law, to obey it. If the party upon whom it is served refuses to comply with the terms of the judgment, he may be punished by the court as for a contempt. Wait's Code, 531, § 285.

555. In what cases can an execution be issued as of course, and in what cases is leave of court necessary?

An execution may issue as of course at any time within five years after the entry of judgment; but after a lapse of five years from the entry of judgment an execution can be issued only by leave of the court. Wait's Code, 526, 530, §§ 283, 284.

556. Is it necessary to obtain leave to issue a second execution where a prior execution has been issued and returned unsatisfied in whole or in part?

It is not if such prior execution has been issued on the judgment within five years. Wait's Code, 530.

557. How would you proceed to obtain leave to issue an execution?

If the adverse party is a resident and can be found, he

should be personally served with a notice of the application for leave to issue the execution. The notice should be given at least eight days before the hearing. If the adverse party is a non-resident or cannot be found, service may be made by publication or in such other manner as the court may direct. Satisfactory proof must be furnished at the hearing that the judgment or some part thereof remains unsatisfied and due. On such application and proof leave to issue an execution must be granted. Wait's Code, 530, 531.

558. Can an attorney issue an execution on a judgment recovered in a justice's court when a transcript has been filed with the county clerk?

He can. The decisions to the contrary have been overruled. Wait's Code, 88, note g; 2 Till & S. Pr. 745.

559. To what county or counties may an execution be issued?

An execution against the property of a judgment debtor may be issued to the sheriff of any county where judgment is docketed. Where the execution requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties. Wait's Code, 532, § 287.

560. In what cases may an execution against the person issue?

An execution against the person of a judgment debtor can issue only in an action in which the defendant might have been arrested as provided in sections 179, 181 of the Code; and in such actions only when an execution against the property of the defendant has been returned unsatisfied in whole or in part, and where either an order of arrest has been served, or the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179 of the Code. Wait's Code, 533.

561. *If the cause of action and the cause of arrest are not identical, will the mere averment of facts in the complaint, which, in an affidavit, would justify the issuing of an order of arrest, authorize an execution against the person of the defendant?*

It will not. The mere averment of facts in a complaint forming no part of a cause of action will not of itself authorize an execution against the person of the defendant. Wait's Code, 534.

562. *Will the contracting of a debt in a fiduciary capacity be such a cause of action as, in case of judgment for the plaintiff, warrant an execution against the person?*

It will not, and no execution against the person can issue unless the defendant has been served with an order of arrest. Wait's Code, 534, note e.

563. *Can an execution against the person of the defendant be issued on a judgment in an action for the conversion of, or injury to, property, where no order of arrest has been issued?*

It can. Wait's Code, note d.

564. *In what cases may a plaintiff be arrested on an execution against his person?*

A plaintiff who fails in an action of tort, in which the defendant was liable to arrest, may be arrested on an execution against his person for the costs of such action, although the defendant was not in fact arrested, and no order had been made for his arrest. Thomp. Prov. Rem. 137; Wait's Code, 534, note j.

565. *In what cases will a defendant, who is in actual custody, under an order of arrest at the time that judgment is rendered against him, be exempt from arrest on execution issued in the action?*

The defendant will be exempt from arrest on execution in such action, if the plaintiff neglects to enter judgment within one month after it is in his power to do so, or neglects to issue execution against the person of the defendant within three

months after the entry of judgment, and the defendant has obtained his discharge from custody on either of these grounds. Wait's Code, 533, § 288.

566. What does the Code require as to the form of all executions?

The Code requires that the execution shall be directed to the sheriff, or coroner when the sheriff is a party, or interested, subscribed by the party issuing it, or his attorney, and shall intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued. It must also contain the direction to the officer as to the manner as to which the writ must be executed, which will vary according to the kind of execution issued. Wait's Code, 538, § 289.

567. What directions to the sheriff are peculiar to an execution against the property of the judgment debtor?

The execution must require the officer to satisfy the judgment out of the personal property of the debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter. Wait's Code, 538, § 289.

568. What directions to the sheriff must be contained in an execution against the person of the judgment debtor?

The execution must require the officer to arrest the debtor and commit him to the jail of the county, until he shall pay the judgment or be discharged according to law. Wait's Code, 539, § 289.

569. Within what time is an execution returnable?

The execution should be returned to the clerk with whom the record of judgment is filed within sixty days after its receipt by the officer. Wait's Code, 540, § 290.

570. *What is the first duty of the sheriff on the receipt of an execution?*

It is the first duty of a sheriff, upon the receipt of an execution, to indorse upon it the year, month, day and hour in which it was received by him. Wait's Code, 542, note *a*.

571. *What degree of care is required of the sheriff in the custody of goods seized under an execution; and when is he responsible for injuries happening to such goods when in his custody?*

A sheriff is required to take the same care of property in his custody that a careful, prudent man of good sense would exercise over the property if it were his own ; and he is liable for injuries happening to the property while it is in his custody only when such care has not been exercised. Wait's Code, 542, note *k* ; 2 Wait's Law & Pr. 1118, note 378.

572. *How must a levy on personal property be made?*

To constitute a valid levy, the officer must enter on the premises where the goods are, and take them into his possession if practicable ; if not, he must openly assert his title by virtue of his execution. Wait's Code, 544, note *b*.

573. *A made a promissory note in which he inserted the following clause, "and I hereby waive and relinquish all right of exemption of any property I may have from execution on this debt." On the dishonor of the note, the holder brought an action, recovered judgment, and issued an execution under which certain property belonging to A, and exempt from execution, was seized and sold. Can A recover back the property so taken in an action in the nature of replevin?*

He can. A party cannot, by prospective agreement, waive the exemption given by law, and any agreement by which such waiver is attempted is null and void. Wait's Code, 553.

574. *When has a creditor an unqualified right to an order requiring a judgment debtor to appear before a judge and answer concerning his property?*

The Code gives a creditor an unqualified right to an order for the examination of a judgment debtor whenever an execu-

tion against the property of such debtor has been returned unsatisfied in whole or in part. Wait's Code, 561, *note a*.

575. *In what cases may an order for the examination of a judgment debtor be had before the return of an execution against his property?*

Such an order may be had after an execution against the property of the debtor has been issued, when it is proved to the satisfaction of the judge to whom the application for the order is made, that the debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment. Wait's Code, 557, § 292.

576. *When may the judgment of a justice of the peace be made the foundation of proceedings supplementary to execution?*

Proceedings supplementary to execution may be had on a justices' judgment, when its amount is for \$25 or upward, exclusive of costs, and a transcript thereof has been filed with the county clerk, and an execution against the property of the judgment debtor has been issued thereon and returned unsatisfied in whole or in part. Wait's Code, 557, § 292.

577. *Would you apply to a judge at chambers or to a justice holding a special term for an order for the examination of a judgment debtor in proceedings supplementary to execution?*

The application is properly made at chambers, although a valid order may be made by a justice while holding a special term. Wait's Code, 561, *note b*.

578. *Can supplementary proceedings be instituted against a corporation?*

They cannot. The remedy of the judgment creditor, where an execution against the property of a corporation has been returned unsatisfied, is, by petition to the supreme court, to have the property of the corporation sequestered, and a receiver appointed. Wait's Code, 559.

579. Is it necessary that the order for the examination of a judgment debtor should require him to appear before the judge granting the order?

It is not. Such was the rule before the amendment of section 300 of the Code in 1857, but the practice now is to appoint a referee, before whom the debtor must appear and answer in the first instance. Wait's Code, 562, note b.

580. In what manner may the judgment debtor be prevented from disposing of his property subsequent to the granting of the order for his examination?

The judge granting the order for the examination of the debtor, or appointing a receiver of his property may also by order forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith. Wait's Code, 573, § 298.

581. In what cases may the judgment debtor be brought before the judge by warrant instead of by order?

Where it has been made to appear to the satisfaction of the judge by affidavit or otherwise that there is danger of the debtor's leaving the State, or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, the judge may issue a warrant requiring the sheriff of any county where the debtor may be, to arrest him and bring him before the judge. Wait's Code, 558, § 292.

582. State generally the proceedings upon the arrest of the judgment debtor?

The judgment debtor upon being arrested and brought before the judge is examined under oath as to the facts upon which the warrant was granted. If it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply on the judgment, he may be ordered to enter into an undertaking with one or more sureties, to the effect that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution; and in default of his complying with

this order he may be committed to prison by warrant of the judge as for contempt. Wait's Code, 558, § 292.

583. State generally the mode of conducting the examination before the judge or referee?

Upon the appearance of the debtor and other persons summoned to attend the examination, the judgment creditor in person or by attorney proceeds to examine the debtor concerning any property which he may possess or has possessed, and also how, when, and for what consideration he has parted with the possession of property which he may formerly have had. The creditor is allowed to make a searching examination respecting the property of the debtor, and to require detailed statements in respect thereto. Instead of examining the judgment debtor, the creditor may confine his examination exclusively to witnesses summoned for that purpose. No person on the examination can be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud, or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose. The debtor is entitled to be examined in his own behalf in the same manner as a witness, and to have the aid and assistance of counsel. 2 Till. & S. 870-873.

584. How may witnesses be compelled to appear and testify in proceedings supplementary to execution?

They may be required to appear and testify in the same manner as upon the trial of an issue, viz.: By the service of a subpoena and prepayment of the statutory fees. Wait's Code, 569, § 295.

585. In what cases may a creditor have an order for the examination of any debtor of the judgment debtor, or any person having property belonging to the judgment debtor?

The order may be had after the issuing or return of an execution against the property of the judgment debtor, or of any one of several debtors in the same judgment, upon an affidavit that any person or corporation has property of the

judgment debtor, or is indebted to him in an amount exceeding \$10. Wait's Code, 566, § 294.

586. *Has the judgment debtor a right to be present at the examination of his debtors and take part in the proceedings?*

The judgment debtor cannot demand that notice of the examination should be given him as a matter of right. The matter of giving notice of the examination to any party to the action rests wholly in the discretion of the judge. Wait's Code, 567.

587. *How may any debtor of a judgment debtor avoid the annoyance of an examination in proceedings supplementary to execution?*

By paying to the sheriff, after an execution against the judgment debtor has issued, the amount of his debt, or so much of the same as may be necessary to satisfy the execution, taking the sheriff's receipt for the amount so paid. Wait's Code, 565, § 293.

588. *In what manner is the discovery of property in the possession, or belonging to the judgment debtor, by proceedings supplementary to execution, made available to the judgment creditor?*

Upon the discovery of any property of the judgment debtor, not exempt from execution, either in the hands of the debtor or any other person, or due to the judgment debtor, the judge may order such property applied toward the satisfaction of the judgment. Wait's Code, 570, § 297.

589. *If it appear that a person or corporation alleged to have the property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, how should the judgment creditor proceed to test the validity of the claim or the truth of the denial?*

In case no receiver of the property of the judgment debtor had been previously appointed the judgment creditor should at once procure an order appointing a receiver, and forbidding a transfer or other disposition of the property or interest, until the receiver so appointed has had sufficient opportunity to

commence an action against the claimant for the recovery of the property or interest, and to prosecute the same to judgment and execution. Wait's Code, 578, § 299.

590. What earnings of the judgment debtor may be reached by supplementary proceedings ?

All earnings of the judgment debtor, due at the time of granting the order for his examination, may be applied toward the satisfaction of the judgment, except the earnings of the debtor for his personal services, at any time within sixty days next preceding the order that his property be applied to the satisfaction of the judgment. These earnings cannot be so applied, if it is made to appear by the affidavit of the debtor or otherwise, that they are necessary for the use of a family supported wholly or partly by his labor. Earnings becoming due after the service of the order of examination cannot be reached by supplementary proceedings. Wait's Code, 571.

591. How are all orders made by a judge or referee in supplementary proceedings enforced ?

A judge or referee may enforce obedience to any order made by him in supplementary proceedings and duly served, by punishing all disobedience to the same by commitment as for contempt. Wait's Code, 579, § 302.

592. What costs may be allowed in proceedings supplementary to execution ?

The judgment creditor, or any party examined whether a party to the action or not, may be allowed witness fees and disbursements, and a fixed sum in addition not exceeding \$30. If no property is found, the costs are due from the creditor to the debtor or the party examined in the same manner as if the creditor had failed in an action against him. Wait's Code, 579, § 301, and notes.

593. How may proceedings supplementary to execution be terminated ?

1. By consent of parties ; 2. By a voluntary abandonment by the creditor and a failure to appear at the time appointed for the examination ; 3. By an order of the judge vacating the

order for the examination. Wait's Code, 563, *note n*; id. 565, *note a*.

594. *In what manner has the law provided for the correction of errors in legal proceedings?*

The law provided two modes by which errors in legal proceedings may be corrected: 1. By motion, where the error is one of form, arising out of a failure to conform to the settled practice of the court; 2. By appeal, where the errors consist in the omission of the court itself to properly observe and apply the law, to the rights involved in controversy in making its adjudication upon them. Wait's Code, 643, *note a*.

595. *In what manner only may a judgment or order in a civil action be reviewed?*

By appeal. Wait's Code, 643, § 323.

596. *To whom is the right of appeal given by the Code?*

The Code gives the right of appeal to any party aggrieved. This restricts the right to the party of record or his representatives, and excludes strangers to the action. Wait's Code, 646.

597. *How are the parties to an appeal designated?*

The party appealing is called the appellant, and the adverse party the respondent. The title of the action remains unchanged. Wait's Code, § 326.

598. *How is an appeal effected?*

An appeal is made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. Wait's Code, 646, § 327.

599. *Whom do you understand to be the "adverse party" upon whom notices of appeal must be served?*

Every party to an action, whether plaintiff or defendant, who has an interest in sustaining the judgment or determination appealed from is, within the meaning of the Code, a party adverse to the appellant, and as such is entitled to notice of appeal. Wait's Code, 647, *note e*.

600. *Should the notice of appeal be served upon the party or on the attorney of record in the court below?*

It should be served upon the attorney of record. Wait's Code, 647, *note f.*

601. *Whose duty is it to transmit to the appellate court the papers upon which an appeal is brought?*

It is primarily the duty of the appellant to cause a certified copy of the notice of appeal and of the judgment-roll, or, if the appeal be from an order, a certified copy of the order, and the papers upon which the order was granted, to be transmitted to the appellate court by the clerk with whom the notice of appeal is filed. But, in case the appellant shall neglect to cause the papers to be so transmitted, the respondent may cause it to be done and recover the expenses so incurred as a disbursement, in case the judgment or order appealed from shall be in whole or in part affirmed. Wait's Code, 648, § 328; id. 809; Rule 1, Court of Appeals.

602. *Upon an appeal from a judgment, what orders may be reviewed?*

Any intermediate order involving the merits and necessarily affecting the judgment. Wait's Code, 649, § 329.

603. *What judgment may be rendered by the appellate court upon an appeal from a judgment or order?*

Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to any or all the parties, and may, if necessary or proper, order a new trial. So, when the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Wait's Code, 649, § 330.

604. *Within what time must an appeal to the court of appeals be taken?*

When a party wishes to appeal from an order affecting a substantial right, when such order in effect determines the action and prevents a judgment from which an appeal might

be taken, or discontinues the action, and when such order grants or refuses a new trial, or when such order strikes out an answer, or any pleading in an action, the appeal must be taken within sixty days after written notice of the order has been given to the party appealing. In all other cases the appeal must be taken within two years after judgment has been perfected, by filing the judgment roll. Wait's Code, 652, § 331.

605. *Within what time must an appeal be taken to the supreme court from a judgment rendered by a county court, or by the mayor's or recorder's courts of cities?*

The appeal must be taken within two years after the judgment has been perfected by the filing of the judgment roll. Wait's Code, 652, § 331.

606. *What appeals must be taken within thirty days after written notice of the judgment or order has been given to the party entitled to appeal therefrom?*

All appeals which may be taken to the general term of either the supreme court, the superior court of the city of New York, or the court of common pleas of that city, from a judgment rendered at special term in the same court, or from orders by a single judge, in cases where an appeal may be taken to the general term, must be taken within thirty days after written notice of the judgment or order has been given to the party appealing. Wait's Code, 652, § 332.

607. *Within what time must a notice of an appeal to the county court, from a decision of a justice of the peace, be served?*

Within twenty days after judgment. Wait's Code, 696, § 353.

608. *Can the time in which an appeal must be taken be enlarged by the court, or by a judge out of court?*

The time in which an appeal must be taken cannot be enlarged by a judge out of court, nor can the time be enlarged by the court itself. 2 Till. & S. 891; Wait's Code, 767, § 405; id. 642, note e.

609. *Can an appeal be taken directly to the court of appeals from a judgment of a special term of the supreme court?*

It cannot. The special term decision must first pass under review at the general term. Wait's Code, 655, note e.

610. *What must be the character of a decree or judgment of the general term, in order to be made the subject of an appeal to the court of appeals?*

The judgment or decree must be final, so that no further application to the court can be necessary in order that the parties may obtain the entire benefit of it. Wait's Code, 655, note a.

611. *Has the court of appeals power to review a question of fact which has been passed upon by a jury at the special term?*

It has not. Wait's Code, 659, note aa.

612. *What is the general rule as to appeals from orders, the granting or refusing of which is discretionary with the court below?*

As a general rule discretionary orders are not appealable, and will not be reviewed in the court of appeals; but where an order is denied on the ground that the court had not the power to grant the relief sought, the order denying the relief is appealable. So where an order denies a strictly legal right, it is appealable. Wait's Code, 659, note jj.

613. *Will an appeal lie to the court of appeals from an order dismissing an appeal to the general term of the supreme court?*

It will. Wait's Code, 658, note r.

614. *What security is required on the part of the appellant on an appeal to the court of appeals?*

To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay

all costs and damages which may be awarded against him on the appeal, not exceeding \$500, or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal, unless such undertaking or deposit is waived by a written consent on the part of the respondent. Wait's Code, 670, § 334.

615. *What is necessary to render an appeal from a judgment, directing the payment of money, a stay of the execution of the judgment?*

In order that an appeal from a judgment directing the payment of money shall operate as a stay of proceedings on the judgment, a written undertaking must be executed on the part of the appellant by at least two sureties, to the effect that, if the judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal, or the appellant must make a deposit of money to the amount for which the undertaking should be given. Wait's Code, 672, § 335.

616. *What proceeding is necessary to render an appeal from a judgment directing the assignment or delivery of documents, or personal property, a stay of proceedings on the judgment?*

In order that the appeal shall operate as a stay of proceedings on the judgment, the things required to be assigned or delivered must be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or an undertaking must be given on the part of the appellant to the effect that he will obey the order of the appellate court upon appeal. Wait's Code, 674, § 336.

617. *How would you proceed to obtain a stay of proceedings by an appeal from a judgment directing the execution of a conveyance or other instrument?*

The execution of the judgment may be stayed by execu-

ting the instrument as directed by the judgment, and depositing the same with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. Wait's Code, 674, § 337.

618. *What must be the tenor of an undertaking which shall have the effect of rendering an appeal from a judgment directing the sale or delivery of possession of real property, a stay of proceedings on such judgment?*

The undertaking must be to the effect that, during the possession of such property by the appellant, he will neither commit nor suffer to be committed any waste thereon, and that, if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which must be specified in the undertaking. Wait's Code, 674, § 338.

619. *Does the perfecting of an appeal operate as a stay upon all the proceedings in the action in which the judgment appealed from was rendered?*

It stays all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but it does not prohibit the court below from proceeding upon any other matter included in the action, and not affected by the judgment appealed from. Wait's Code, 675, § 339.

620. *Is it necessary to apply to the court for a stay of proceedings on the judgment, where security has been given for the costs of the appeal, and for the performance of the judgment appealed from, in case such judgment is affirmed by the appellate court?*

It is not. The giving of the security stays proceedings on the judgment by force of the statute, without any intervention of the power of the court. Wait's Code, 673, note a.

621. *If an execution has already been levied upon the property of a judgment debtor, and the debtor appeals to the court of appeals from the judgment upon which the execution was issued, and gives the statutory security to obtain a stay of proceedings upon the judgment, what effect will the giving of the security have upon the prior levy?*

It will have no effect upon the prior levy, but will simply suspend all further proceedings upon the execution and levy until the decision of the cause in the appellant court. But while the giving of security will not, *per se*, supersede an execution already levied, the court may discharge the levy, where the security is ample, and the appeal taken in good faith. Wait's Code, 675, note c.

622. *Where the judgment appealed from neither directs the payment of money, the delivery of documents or personal property, the execution of a conveyance or other instrument, nor the sale or delivery of possession of real property, what will be the effect of the giving of the ordinary undertaking for the payment of all costs and damages which may be awarded against the appellant upon the appeal?*

The effect of giving such undertaking in such cases, stays all proceedings in the court below upon the judgment appealed from, except that where it directs the sale of perishable property, the court below may order the property to be sold and the proceeds deposited or invested, to abide the judgment of the appellate court. Wait's Code, 677, § 342.

623. *When must all undertakings given on appeal be served upon the adverse party?*

They must be served with the notice of appeal and not afterward. Wait's Code, 676, § 340.

624. *If the respondent, except in the sufficiency of the sureties to an undertaking given on appeal, and the sureties fail to justify in the manner prescribed by the statute, what effect will this omission have upon the proceedings of the appellant?*

It will be fatal to all the proceedings on the part of the

appellant, as the appeal itself becomes a nullity. Wait's Code, 676, *note a*.

625. Where must all undertakings given on appeal be filed?

They must be filed with the clerk with whom the judgment or order appealed from was entered. Wait's Code, 678, § 343.

626. When is an appeal "perfected?"

An appeal is perfected, within the meaning of the Code, when the proper undertaking, with an affidavit of the sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment order was entered. Wait's Code, 675, *note a*.

627. Of what does a "case" consist?

A case consists of a copy of the return of the clerk, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured ; and if the case is voluminous, an index to the pleadings, exhibits, depositions and other principal matters must be added. Every opinion in the cause at special as well as at general term must be served with the case. Wait's Code, 811.

628. In what cases, and from what courts may an appeal be taken to the supreme court?

An appeal may be taken to the supreme court ; 1. From a *judgment* rendered by a county court, or by the mayor's courts, or the recorder's courts of cities ; 2. From an *order* affecting a substantial right made by a county court or a county judge in any action or proceeding. Wait's Code, 678, § 344.

629. Upon what papers must an appeal to the supreme court from an order of a county court or county judge be heard?

The appeal must be heard on a copy of the papers on which the order appealed from was made. Wait's Code, 678, § 344.

630. *What security must be given by the appellant upon an appeal to the supreme court?*

Security must be given upon an appeal to the supreme court in the same manner, and to the same extent, as upon an appeal to the court of appeals. Wait's Code, § 345.

631. *Where must appeals to the supreme court be heard?*

The appeal must be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county, except that where the judgment or order was entered in the city and county of New York, the appeal must be heard in the first district. Wait's Code, 679, § 346.

632. *In what cases may an appeal be taken to the general term of the supreme court from a judgment rendered at a special term of that court?*

An appeal upon the law may be taken to the general term from a judgment entered upon the report of referees or the direction of a single judge of the same court in all cases, and upon the fact, when the trial is by the court or referees. Wait's Code, 680, § 348.

633. *Can an appeal be taken from a judgment by default?*

It cannot. Wait's Code, 681, note g.

634. *State the general rule as to what objections not raised at the trial, may be raised for the first time upon appeal?*

Any objection not raised at the trial, and which if raised, could not have been obviated, may be raised upon appeal; but any objection not raised upon the trial, which if raised might have been obviated, cannot be raised for the first time upon appeal. Wait's Code, 683, note h.

635. *From what orders made by a judge at special term may an appeal be taken to the general term?*

1. Where the order grants or refuses, continues or modifies a provisional remedy; 2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer; 3. Where it involves the merits of the action, or some part thereof or

affects a substantial right ; 4. When the order in effect determines the action and prevents a judgment from which an appeal may be taken ; 5. When the order is made upon a summary application in an action after judgment and affects a substantial right. Wait's Code, 685, § 349.

636. *Will an appeal lie from the decision of a judge granting or refusing an ex parte order ?*

It will not. Wait's Code, 686.

637. *Can an appeal to the general term of the supreme court be taken from the decision of a surrogate admitting a will to probate ?*

It can. Wait's Code, 689, note r.

638. *What orders may be said to "involve the merits" within the meaning of the Code ?*

All orders made in the progress of a cause involve the merits, except such as relate merely to matters resting in the discretion of the court, or to mere matters of practice or form of proceedings. Wait's Code, 690, note d.

639. *What is a "substantial right" within the meaning of the Code ?*

A substantial right is a fixed, determinate right, independent of the discretion of the court, and one having some value.

640. *After an order has been made granting or denying a motion, what still remains to be done before an appeal can be taken therefrom ?*

Before an appeal can be taken the order must be entered and the moving papers filed with the clerk. Wait's Code, 690, note b.

641. *What papers must be served on the adverse party and furnished to the court upon an appeal to the general term from an order ?*

All papers used upon the motion must be served with the notice of appeal ; and similar copies must be furnished to the

judges at the argument, or the appeal will be dismissed. Wait's Code, 692, note a.

642. *How would you obtain a stay of proceedings under an order from which an appeal had been taken to the general term?*

By an application to the court, or to a judge of the court. Wait's Code, 692, § 350.

643. *To what court would you take an appeal from a judgment rendered by a justice of the peace?*

If the judgment was rendered in a justice's court of the city of New York the appeal should be to the court of common pleas for the city and county of New York. If the judgment was rendered in the city of Buffalo the appeal should be taken to the superior court of that city. In all other cases the appeal should be to the county court of the county where the judgment was rendered. Wait's Code, 694, § 352.

644. *In what cases may an appellant have a new trial in the county court on an appeal from a judgment of a justice of the peace?*

A new trial may be had in the county court where the amount of the claim or claims for which judgment was demanded by either party in his pleadings in the court below exceeds \$50, or where, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered exceeds \$50, exclusive of costs. 1. When the judgment was rendered upon an issue of law joined between the parties; 2. When it was rendered upon an issue of facts joined between the parties, whether the defendant was present at the trial or not. Wait's Code, 695.

645. *What service must be made of a notice of appeal from a judgment of a justice of the peace to the county court?*

The notice of appeal must be served on the justice personally if living within the county, or on his clerk if there be one, and on the respondent personally, or by leaving it at his resi-

dence with some person of suitable age and discretion ; or, in case the respondent is not a resident of the county, or cannot, after due diligence, be found therein, the service should be made in the same manner on the attorney or agent, if any, who is a resident of the county, and appeared for the respondent on the trial ; and, if neither the respondent nor his agent or attorney can be found in the county, the notice may be served on the respondent by leaving it with the county clerk. Wait's Code, 697, § 354.

646. *If personal service of the notice of appeal cannot, for any reason, be made on the justice, what course should the appellant pursue ?*

He should serve the notice by leaving it with the county clerk. Wait's Code, 703, § 359.

647. *How may the appellant obtain a stay of execution of the judgment on an appeal from a judgment of a justice of the peace to the county court ?*

The appellant may stay execution of the judgment by giving security in the form of a written undertaking, executed by one or more sufficient sureties, approved by the county judge or by the court below, to the effect that, if judgment be rendered against the appellant, and execution thereon be returned unsatisfied in whole or in part, the sureties will pay the amount unsatisfied. The delivery of this undertaking to the justice will stay the issuing of execution ; or, if an execution has been issued, the service of a copy of the undertaking, certified by the justice, upon the officer holding the execution, will stay all further proceedings thereon. Wait's Code, 703, § 357.

648. *Of what must the return of the justice consist, where a new trial is sought in the county court, and where the amount for which judgment was demanded by either party in the pleadings in the court below exceeded \$50, or where the value of the property recovered exceeded that sum ?*

The return of the justice must consist of the process by which the action was commenced, with proof of service, the pleadings or copies thereof, the proceedings and judgment,

together with a brief statement of the amount and nature of the claim or claims litigated by the respective parties. The notice of appeal must also be annexed to the return. Wait's Code, 703, § 360.

649. What must the justice return to the appellate court where no new trial is sought?

If no new trial can be had in the appellate court, the return of the justice should consist of the testimony, proceedings and judgment, with the notice of appeal annexed. Wait's Code, 703, § 360.

650. How should the appellant proceed, if the return of the justice is defective in any essential particulars?

The appellant should apply to the county court for an order directing a further or amended return; and, if the order is not complied with, should proceed to have the justice punished as for contempt. Wait's Code, 705, § 362.

651. If a justice of the peace, whose judgment is appealed from, should die before making a return to the county court, would the appeal be dismissed on account of the impossibility of obtaining a return?

It would not. The county court, in that case, would proceed to examine witnesses on oath, as to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. Wait's Code, 706, § 363.

652. What is the condition precedent to the right to compel a return by attachment?

The payment of the fees allowed for the making of a return is made by the Code a condition precedent to the right to compel a return by attachment. Wait's Code, 703, § 360.

653. If your client had appealed to the county court from a judgment rendered against him by a justice of the peace and the appeal had been improperly dismissed by the appellate court before it could be brought to a hearing, how would you proceed to protect your client's rights?

It would be proper in that case to apply to the supreme

court for a writ of *mandamus* to compel the county court to re-instate the appeal and to proceed to judgment. Wait's Code, 52, *note f*; Moses on Mandamus, 26.

654. Upon what papers must an appeal be heard?

The appeal must be heard upon the original papers or certified copies of the same. Wait's Code, 707, § 365.

655. How are technical errors, and defects not affecting the merits, disposed of in the county court upon the hearing of an appeal?

Such errors and defects are disregarded and the court proceeds to render judgment according to the justice of the case. Wait's Code, 707, § 366.

656. In what cases may a new trial in a justices' court be ordered?

A new trial may be ordered before the same or any other justice of the same county, in all cases where the defendant failed to appear before the justice, and it is shown by affidavits served by the appellant or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default. The granting of this order is, however, at the discretion of the court, as are also the terms on which it may be granted if a new trial is allowed. Wait's Code, 707, 712.

657. State generally the mode of proceeding upon a new trial in the county court?

If the issue joined before the justice was an issue of law, the court proceeds to a hearing of the cause, but if the issue was upon a question of fact, the trial is by a jury. Upon an issue of law the court renders judgment according to the law of the case; and if the judgment is against the pleading of either party an amendment may be allowed on the same terms and in like case as pleading in actions in the supreme court; the court may thereupon require the opposite party to answer the amended pleading or join issue thereon, as the case may require, summarily. In the same manner the court may require issue to be joined, or pleading answered where the pleading demurred to is held valid. Upon an issue of fact

being so joined, the court proceeds to hear the same tried by a jury in the same manner as issues joined in the supreme court. Wait's Code, 706, § 366.

658. *What constitutes the judgment roll in cases of appeal to the county court?*

The judgment roll consists of the judgment of the appellate court, with the return upon which it was heard, or a certified copy thereof, the notice of appeal, and any offer, verdict, decision of the court, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the judgment annexed. Wait's Code, 717, § 367.

659. *How are costs awarded after judgment on appeal?*

If the judgment appealed from is affirmed, costs are awarded to the respondent. If it be reversed, costs are awarded to the appellant. If it be affirmed in part, the costs, or such part as the court deems just, may be awarded to either party. Wait's Code, 717, § 363.

660. *If a judgment rendered by a justice of the peace has been collected, and such judgment is reversed on appeal, in what manner is the appellant restored to his rights?*

In such cases the appellate court orders the amount paid or collected to be restored, with interest from the time of such payment or collection. Wait's Code, 718, § 369.

661. *When and how may this order be obtained?*

The order may be obtained on proof of the facts made at or after the hearing, upon previous notice of six days, and if the order is made before judgment is entered the amount may be included in the judgment. Wait's Code, 718, § 369.

662. *Give the definition of an order?*

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an *order*. Wait's Code, 757.

663. Give the distinction between an order and a judgment?

An order is the decision of a motion ; a judgment is the decision of a trial. Wait's Code, 757.

664. What is a motion?

A motion is an occasional application to the court, on behalf of one of the parties, for the purpose of obtaining some rule, or order, which becomes necessary in the progress of a cause ; and it is usually grounded upon an *affidavit*, setting forth the facts and circumstances requisite to support the application, and preceded by a written notice to the opposite party. 3 Shars. Bl. Com. 304 ; 1 Burr. Pr. 323. An application for an order is a motion. Wait's Code, 762.

665. What is the distinction to be observed between enumerated and non-enumerated motions?

The former are the more important in their character, as they involve the merits of the action. They require greater care and formality in preparing and bringing them on for argument, occupy more time and attention in the argument and decision of them, and, when decided, are decisive of the action itself, unless properly appealed from. Non-enumerated motions, on the other hand, relate merely to incidental points of practice, not involving the merits of the action, and are employed as auxiliary to the general course of the proceedings. 1 Burr. Pr. 327.

666. Give examples of enumerated motions, as defined by rule of the supreme court?

They are : Motions arising on special verdict ; issues of law ; cases ; exceptions ; appeals from orders sustaining or overruling demurrers ; appeals from a judgment or order granting or refusing a new trial in an inferior court, and appeals by virtue of section 348 of the Code. Wait's Code, 845.

667. Mention some of the most ordinary non-enumerated motions arising in practice?

Some of these are : Motions to set aside summons ; to strike out irrelevant or redundant matter in a pleading ; for

leave to amend a pleading ; to change place of trial ; for security for costs ; for re-adjustment of costs ; to set aside an inquest for irregularity ; for a reference, and motions to compel a report of referees. 2 Monell's Pr. 176.

668. Is it permissible for a party to make separate motions for each objection to his opponent's proceedings ?

It is not. Where a party objects to any proceedings in a cause, he must embody all his objections in one motion. Thus, where a party moved to set aside a demurrer as irregular, and failing, moved for judgment upon it as frivolous, the latter motion was denied. Wait's Code, 758 ; 1 Till. & S. Pr. 409.

669. When the motion is based upon grounds which do not appear upon the face of the pleadings or other papers in the case, in what manner should the application be made ?

In such case it is usual to make application upon affidavit setting forth the facts upon which the party relies for the relief demanded. When the affiant is the moving party, he may make his affidavit in the form of a petition, although no advantage, perhaps, is gained by such form. 1 Till. & S. Pr. 409.

670. Where, and before whom, may affidavits be made ?

Affidavits may be taken before a judge of any court of record, any justice of the peace in towns, any commissioner of deeds, or before a clerk of any court of record. Judges of courts of record may take affidavits in any part of the State ; but a county judge cannot take affidavits except in his own county ; nor can the recorder of a city. The clerk of the county should take them only in his office. 2 R. S. 284 ; 1 Tiff. & Smith's Pr. 424.

671. What are the requisites of an affidavit ?

Every affidavit must show on its face the county in which it was taken, so that the court may know that it was made before an officer having jurisdiction, or it will be a nullity. The names of all the deponents should be mentioned. If made by several deponents, it should show that they were severally sworn. It must appear before whom the affidavit

was taken. This appears by the words "before me" in the *jurat*; and the omission of these words there have been held to be fatal. The *jurat* should state the time when the oath was made, even the day of the month. 1 Tiff. & Smith's Pr. 425; 1 Till. & S. Pr. 410, 411.

672. In order that affidavits made in any other State or country, may be read upon a motion in this State, how should they be taken?

I. Such affidavit may be taken before a judge of a court having a seal, and certificates must be given: 1. By the judge, stating that such affidavit was subscribed and taken before him, specifying the time and place where it was so taken. 2. By the clerk of the court certifying that such court exists, that the judge is a member thereof, and that his signature is genuine; which last certificate must bear the seal of the court. II. It may be taken before any commissioner appointed for the purpose by the governor of this State; but every affidavit so taken must be accompanied by a certificate of the secretary of State, to the effect that he knows the signature and seal of such commissioner to be genuine. 2 R. S. 396; Laws 1850, ch. 270; Laws 1858, ch. 308; 2 Wait's Pr. 646.

673. Is a defective title sufficient to render an affidavit invalid?

No. An affidavit made without a title, or with a defective title, is as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made. Wait's Code, 768.

674. What does the title of an affidavit embrace?

The title of an affidavit embraces its entire heading, namely, the name of the court as well as the names of the parties; therefore, an error in the name of the court, where it appears that the opposite party has not been misled by it, will be disregarded. Wait's Code, 768.

675. At what term may special or non-enumerated motions be heard?

Special or non-enumerated motions are heard at special term, unless otherwise provided by law. Wait's Code, 845.

676. In what county must motions upon notice be made?

Motions upon notice must be made within the judicial district in which the action is triable, or in a county adjoining that in which it is triable; and the county in which an action is triable, is that which is specified in the complaint for that purpose, unless the place of trial has been changed by order of the court. 1 Till & S. Pr. 418.

677. Where and before whom may ex parte motions be made?

Ex parte motions may be made before a judge of the court in any county. If before a county judge, they must be made in the county where the action is triable, or in that in which the moving attorney resides. Wait's Code, 763.

678. In what manner are motions brought before the court?

All motions must be brought before the court on a notice, or by an order to show cause. Where there is, however, no adverse party having any interest in the subject of the motion notice is not required. Wait's Code, 758.

679. In what case will the re-argument of a motion be allowed?

Re-argument of a motion is only allowed where it appears that the justice deciding the motion has overlooked, mistaken or misapprehended some material fact; or has decided upon some question of law not raised or argued by counsel. Under any circumstances, leave to re-argue will rarely be granted where there is a remedy by appeal. Wait's Code, 760.

680. In what way only can a motion be renewed, after being once fully heard and decided?

An interlocutory motion, once fully heard and decided, cannot be renewed, except upon leave of the court for that purpose obtained, unless a different state of facts has arisen since the first determination. Leave to renew is always granted, if, in the circumstances of the opposition, there is any thing to excite suspicion of unfairness, or a belief that the party moving is taken by surprise. Wait's Code, 760; 1 Till. & S. Pr. 442.

681. What is the effect of a party's accepting leave to renew a motion?

By availing himself of leave given to renew a motion, the moving party loses his right to appeal from the original decision. 1 Till. & S. Pr. 443.

682. What length of time must a notice of motion be served before the hearing of the motion?

When a notice of motion is necessary, it must be served eight days before the time appointed for the hearing ; but the court or judge may, by an order to show cause, prescribe a shorter time. Wait's Code, 766.

683. What should the notice of motion contain?

A notice of motion should contain the particular grounds of the motion. Thus, to render a mere irregularity in the summons and copy of papers served available on a motion, it must be specified in the notice. Wait's Code, 766.

684. Upon what terms may a notice of motion be withdrawn?

A notice of motion can be withdrawn only upon the payment of the costs of the motion. But, where the motion includes two distinct matters, one may be withdrawn without payment of costs. Wait's Code, 766.

685. In case the adverse party has any objections to a motion, what preparations should he make for opposing it?

He should consider (1) the defects, if any, in his opponent's proceedings ; (2) his own defense upon the merits. For objections of the first class must be raised first upon the hearing, or they will be considered waived ; and they must be raised at the hearing, if in any way practicable. In order to resist upon the merits, affidavits should be prepared in the usual manner ; if there is not time to do so within the period allowed by the notice, application should be made upon affidavit for a postponement of the hearing, showing some reason why the papers cannot be prepared in time. 1 Till. & S. Pr. 430.

CHAPTER XIX.

EVIDENCE.

1. *In its legal acceptation, what does the word “evidence” include?*

It includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 Greenl. Ev., § 1.

2. *What distinction do writers make between the terms “evidence” and “proof”?*

The most accurate writers employ the term “evidence” to denote the *medium* by which truth is established, while the term “*proof*” is applied to the effect of evidence. When the *evidence* is sufficient to produce a conviction of the truth of the fact to be established, it amounts to *proof*. 1 Greenl. Ev., § 1; 2 Wait’s Law & Pr. 361.

3. *Into what divisions is evidence usually classed?*

Into two, namely: *Direct* evidence, which consists in the testimony, whether *immediately* or *mediately*, derived from those who had actual knowledge of the principal or disputed fact; or *Indirect* or inferential evidence, where an inference is made as to the truth of the disputed fact, not by means of the actual knowledge which any witness had of the fact, but from collateral facts ascertained by competent means. 2 Wait’s Law & Pr. 365.

4. *Give illustrations of the distinction between direct evidence, and circumstantial, or inferential evidence.*

If a witness testifies that he saw A inflict a mortal wound on B, of which he instantly died, this is a case of direct evidence. If a witness testifies that a deceased person was shot with a pistol, and the wadding is found to be part of a letter, addressed to the prisoner, the residue of which is discovered in his pocket; here the facts themselves are directly attested; but the evidence they afford is termed *circumstantial* or *inferential*; and from these facts, if unexplained by the prisoner,

the jury may, or may not, *deduce* or *infer*, or *presume*, his guilt, according as they are satisfied, or not, of the natural connection between similar facts, and the guilt of the person thus connected with them. 1 Greenl. Ev., § 13.

5. What is meant by competent evidence?

It is that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. Evidence, rejected by the law as inadmissible, is denominated *incompetent* evidence. 1 Greenl. Ev., § 13; 2 Wait's Law & Pr. 365.

6. Give the distinction between evidence that is relevant and that which is irrelevant.

Evidence is *relevant* when it bears upon any of the issues to be tried, or when it bears upon any question which is to be determined upon the evidence. It is *irrelevant* when it does not bear upon any issue or question. 2 Wait's Law & Pr. 366.

7. What is cumulative evidence?

It is evidence of the same kind to the same point. Thus, if six witnesses have sworn in a similar manner in relation to a particular transaction, it would be *cumulative* evidence to call several others to the same point. 1 Greenl. Ev., § 2; 2 Wait's Law & Pr. 366.

8. When is evidence said to be conclusive?

Evidence is *conclusive* when it does not admit of explanation or contradiction. It is evidence, which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue. Thus, a record, unless impeached for fraud, is an instance of conclusive evidence. 2 Wait's Law & Pr. 366.

9. What is meant by satisfactory or sufficient evidence?

By *satisfactory* evidence, which is sometimes called *sufficient* evidence, is intended that amount of proof which ordinarily satisfies an unprejudicial mind, beyond reasonable

doubt. Questions respecting the sufficiency of evidence belong exclusively to the jury. 1 Greenl. Ev., § 2; 1 Stark. Ev. 514.

10. Is it within the province of the jury to decide as to the competency and admissibility of evidence?

It is not. All questions respecting the competency and admissibility of evidence are exclusively within the province of the court. 1 Stark. Ev. 514.

11. Mention some of the things of which every court takes judicial notice without evidence to prove their existence, or their extent or validity.

Courts are bound to take notice of the existence of all general statutes, and of the rules of the common law, and the decisions of the superior courts, without any proof whatever upon the subject. They also take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto*, by their own government, and of the local divisions of their country into States, provinces, counties, cities, towns, local parishes and the like, so far as the political government is concerned or affected. 2 Wait's Law & Pr. 366; 1 Greenl. Ev., § 4.

12. Do our courts take judicial notice of foreign laws?

They do not; such laws must be proved like other facts. So, the laws of other States must be proved, if they differ from the common law. 2 Wait's Law & Pr. 357.

13. What is meant by the term "presumption," and into what two branches is presumptive evidence usually divided?

A presumption is said to be "an inference as to the existence of a fact not actually known, arising from its necessary or usual connection with others which are known." The general head of presumptive evidence is usually divided into *presumptions of law* and *presumptions of fact*. Stark Ev. 742; 1 Greenl. Ev., § 14.

14. Of what do presumptions of law consist?

They consist of those rules which, in certain cases, either

forbid or dispense with any ulterior inquiry. They are founded either upon the first principles of justice, or the laws of nature; or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. 1 Greenl. Ev., § 14.

15. What are presumptions of fact?

They are merely natural presumptions derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered. 1 Greenl. Ev., § 44.

16. How do you determine whether a presumption is one of law or one of fact?

To determine whether a presumption is one of law or one of fact, it is merely necessary to ascertain what kind of inference is to be drawn, whether it is one of fact or one of law. If, upon certain evidence given, it is important to ascertain the existence of some other fact, or the truth or falsity of some allegation of fact, the presumption is one of fact. If, on the contrary, no inference of additional facts is necessary in order to make a decision, then the presumption is one of law. 2 Wait's Law & Pr. 387.

17. Give some familiar illustrations of presumptions of law.

It is a presumption of law that a person's motives are good, and that he is honest in his transactions, in the absence of evidence showing fraud or improper motives. So general sanity is presumed, because that is ordinarily the condition of the mind. A man is presumed to intend those necessary consequences which result from his voluntary or deliberate acts. And a written instrument is presumed to have been executed and delivered at the time it bears date. 2 Wait's Law & Pr. 387, 388.

18. What are some of the conclusive presumptions of law, made in favor of judicial proceedings ?

The records of a court of justice are presumed to have been correctly made ; a party to the record is presumed to have been interested in the suit ; and after verdict, it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not expressly and distinctly alleged in the record ; provided it contains terms sufficiently general to comprehend them in fair and reasonable intendment. 1 Greenl. Ev., § 19.

19. In the production of evidence to the jury, is it necessary that the evidence should bear directly upon the particular matters in issue ?

It is an established rule, that the evidence offered must correspond with the allegations, and be confined to the point in issue ; but it is not necessary that the evidence should bear *directly* upon the issue. It is admissible if it *tends* to prove the issue, or constitutes a link in the chain of proof ; although, alone, it might not justify a verdict in accordance with it. 1 Greenl. Ev., §§ 50, 51 ; 2 Wait's Law & Pr. 415.

20. Is it necessary that the relevancy of evidence should appear at the time when it is offered ?

It is not ; for the reason, that it is sometimes difficult to determine whether proof of a particular fact offered in evidence, will or will not become material, and in such cases it is quite usual, in practice, for the court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material. 2 Wait's Law & Pr. 415.

21. How may evidence, which is apparently irrelevant, be shown to be relevant ?

This may be done, either by referring to matters already proved in the cause, or by a statement of some additional evidence which is offered to be given in connection with the proposed fact. 2 Wait's Law & Pr. 416.

22. What is the rule as to the relevancy of evidence adduced, as to the character of a witness ?

Evidence to impeach the character of a witness called by

the opposite party is always relevant ; so of evidence to sustain the character of a witness which has been thus attacked. And, on cross-examination, it may be shown that the witness is hostile to the party against whom he is called, and that he has made statements indicating such hostility, and if he denies making such statements, he may be contradicted by other witnesses. 2 Wait's Law & Pr. 416, 417.

23. What is the second general rule, which governs in the production of evidence, and upon what principles is it founded ?

A second general rule is, that the substance only of the issue needs to be proved ; and this rule is founded on the principles of good sense and justice. If a party proves the substance of the issue, he has proved a substantial ground of action, and is entitled to his remedy. He will not be obliged to prove immaterial averments, which might be expunged from the record without affecting his right to recover. 2 Wait's Law & Pr. 408 ; 1 Greenl. Ev., § 56.

24. In what respect has the strictness of the old law as to variance, been affected by the Code of Procedure, in this State ?

Under the Code, variances are comparatively of little importance. That instrument provides, that "a variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby." Wait's Code, 78. Under this rule, and under sections 169, 170 and 171 of the Code, a liberal system of practice has been established on this subject. 2 Wait's Law & Pr. 408, 409.

25. What is the third rule governing in the production of evidence ?

A third rule is, that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue. Upon the party who has to give such proof, is said to rest the burden of proof ; or, as it is technically called, the *onus probandi*. The above rule is one of convenience,

adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. 2 Wait's Law & Pr. 413 ; 1 Greenl. Ev., § 74.

26. What test is there for ascertaining upon which side the affirmative really lies?

One of the surest tests is, to consider which party would be successful if no evidence at all were given ; or, what amounts substantially to the same thing, to examine whether, if the particular allegation to be proved were struck out of the answer or other pleading, there would or would not be a defense to the action, or an answer to the previous pleading. 2 Wait's Law & Pr. 413.

27. Are there any cases in which both parties hold the affirmative as to the issues to be tried?

There are ; as, for example, where the plaintiff sues for the recovery of money lent, and the defendant interposes a general denial, and also a claim for a set-off. In such a case, the plaintiff would be bound to prove his case ; and if he does so, and then rests his case, the defendant will then be required to establish his set-off by evidence, or it will not be allowed. 2 Wait's Law & Pr. 413.

28. When there is a presumption of law in favor of the affirmative, on whom lies the burden of proof?

In such case, it lies on the party who denies the fact to prove the negative. Thus, in an action upon a bill of exchange or a promissory note, if the defendant answers that there was no consideration for it, he must prove that fact, for the law presumes a good consideration. 2 Wait's Law & Pr. 413, 414.

29. With respect to the burden of proof, what is the rule as to the right of a party to begin, or open and close the case?

Whenever the pleadings throw the affirmative of the issue upon the plaintiff as to any matter of proof, or as to any one of the defendants where there are several, he will be entitled to open and close the case ; but the shifting of the burden of proof during the course of the trial in no way affects this

right. If it belongs to either party at the commencement of the trial, it continues to the close of the case. 2 Wait's Law & Pr. 415 ; 1 Greenl. Ev., § 74.

30. State the fourth rule relating to the production of evidence?

This rule has been expressed in various forms by different authors. Greenleaf gives it as "that which requires the best evidence of which the case in its nature is susceptible." The precise import of the rule can be fully comprehended only by reference to its application in various instances. 1 Greenl. Ev., § 82 ; 2 Wait's Law & Pr. 397.

31. Upon what principle is the rule under consideration founded?

It is founded on the presumption that there is something in the better evidence that is withheld, which would make against the party resorting to inferior evidence. Although, in some instances, this presumption may not be very strong, yet the general effect of the rule is to prevent fraud, and to induce parties to bring before a court or jury the kind of evidence which is least calculated to perplex or mislead them. 2 Wait's Law & Pr. 397.

32. Is the copy of a deed competent evidence, where the party offering it has it within his power to produce the original?

It is not ; for, in such a case, a presumption arises that there is something in the original instrument which would make against such party ; or, in other words, it is not "the best evidence of which the case in its nature is susceptible." 2 Wait's Law & Pr. 397.

33. Does the rule as to the best evidence, etc., have reference to the measure or quantity of the evidence offered?

The rule relates, not to the measure or quantity of the evidence offered, but to its *quality*, when compared with some other evidence of superior degree. It is not necessary, in point of law, to give the fullest proof that every case will admit of. Thus, if there are several eye witnesses to a particu-

lar fact, it may be proved by the testimony of one or more of them, without calling the others. 2 Wait's Law & Pr. 397, 398.

34. Give the distinction between primary and secondary evidence?

Primary evidence is that kind of proof, which, under any possible circumstances, affords the greatest certainty of the fact in question ; and it is illustrated by the case of a written document ; the instrument itself being always regarded as the primary or best possible evidence of its existence and contents. All evidence falling short of this in its degree, is termed *secondary*. Evidence which carries on its face no indication that better remains behind, is not secondary, but primary. 1 Greenl. Ev., § 84.

35. In what class of cases is secondary evidence most frequently excluded, and the best evidence required?

It most frequently occurs, where oral evidence is offered in the place of written instruments. These instruments may be reduced to three classes : 1. Those instruments which the law requires to be in writing ; 2. Those contracts which the parties have put into writing ; and, 3. All other writings, the existence of which is disputed, and which are material to the issue. 1 Greenl. Ev., § 85 ; 2 Wait's Law & Pr. 398.

36. Mention some of the instruments under the first class, which the law requires to be in writing, and for which oral evidence cannot be submitted?

They are : records, public documents, official examinations, deeds of conveyance of lands, wills, other than nuncupative, promises to pay the debt of another, and other writings mentioned in the Statute of Frauds. In all these cases, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, as long as the writing exists, and is in the power of the party. 1 Greenl. Ev., § 86.

37. Why cannot oral proof be substituted for the written evidence of any contract which the parties have put in writing?

Because the written instrument in such case may be

regarded, in some measure, as the ultimate fact to be proved, especially in the cases of negotiable securities ; and in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction.
1 Greenl. Ev., § 87.

38. On what ground is secondary evidence rejected, in the case of writings, the existence of which is disputed, and which are material to the issue?

By the rejection of secondary evidence in such case, the court acquires a knowledge of the whole contents of the instrument, which may have a different effect from the statement of a part ; for there is extreme danger in relying on the recollection of witnesses, however honest, as to the contents of written instruments. 1 Greenl. Ev., § 88 ; 2 Wait's Law & Pr. 400.

39. Suppose the written communication or agreement between the parties is merely collateral to the question in issue ; in such case, need it be produced ?

It need not, as for example : Where the writing is a mere proposal, which has not been acted upon ; or, where a written memorandum was made of the terms of the contract, which was read in the presence of the parties, but never signed, or proposed to be signed ; or, where, during an employment under a written contract, a separate verbal order is given, and in many similar instances. 1 Greenl. Ev., § 89.

40. Give some illustrations of writings where there is no ground for the exclusion of oral evidence.

This class includes all writings not falling within either of the three classes already described. Thus, the payment of money may be proved by oral testimony, though a receipt be taken ; in trover, a verbal demand of the goods is admissible, though a demand in writing was made at the same time ; and the admission of indebtedness is provable by oral testimony, though a written promise to pay was simultaneously

given, if the paper be inadmissible for want of a stamp. 1 Greenl. Ev., § 90.

41. What are some of the exceptions to the rule, which requires the best evidence?

Where it is necessary to prove the contents of any record, or of proceedings in a court of justice, or in public books or registers, it is sufficient, in general, to produce an examined copy. So it is not in general necessary to prove the appointment of public officers, by producing record evidence of their election or appointment, for this would be attended with general inconvenience. A further relaxation of the rule has been admitted where the evidence is the result of *voluminous facts*, or of the inspection of many books and papers, the examination of which could not conveniently take place in court. 2 Wait's Law & Pr. 400; 1 Greenl. Ev., §§ 91-95.

42. What is meant by hearsay evidence?

In its legal sense it denotes that kind of evidence which does not derive its value from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person. As a general rule, *hearsay* evidence is totally inadmissible. 1 Greenl. Ev., § 99.

43. State a principal ground of objection to the admission of hearsay evidence.

The great bulk of the proof made in the trial of actions is the testimony of witnesses, orally delivered; and, as a test of truth, it is indispensable to the due administration of justice, that every living witness should be subjected to the ordeal of a cross-examination. But testimony derived from the relation of third persons, even when the informant is known, cannot be subjected to this test, nor is the statement under oath; and, besides, it is frequently impossible to ascertain through whom, or how many persons, the narration has been transmitted from the original witnesses of the fact. 2 Wait's Law & Pr. 390.

44. Are there any exceptions to the rule which excludes hearsay evidence?

There are ; but those cases in which it is received are of that character which sufficiently guards against frauds ; and, in most of them, the rejection of the evidence would work a greater mischief than could result from its reception. There are also some cases in which *hearsay* is treated as original evidence. 2 Wait's Law & Pr. 390.

45. In what cases does hearsay partake of the nature of original evidence?

In cases where it is material to inquire into the demeanor, the conduct and mental feelings of an individual at a particular period, the expressions used by the individual at the period in question, are in their nature original evidence ; for they are the thing itself which is inquired into, as far as outward behavior is important ; and as evidence of existing inward sentiments, they are unlike a statement of past occurrences, for they derive their credit from being usually identified with, and naturally resulting from, particular corresponding feelings. 2 Wait's Law & Pr. 390.

46. What is the rule as regards the admission of hearsay evidence in matters of public or general interest?

In cases of this kind it is sometimes admissible, as for example, for the purpose of showing that a particular person holds a specified office or a public employment as an officer. Thus, in an action brought by an overseer of the poor to recover a penalty, the character in which he sue^s may be proved by reputation. So such evidence is sufficient to show that the plaintiff is trustee or collector of a school district. 2 Wait's Law & Pr. 391, 392.

47. In matters of pedigree, such as descent or relationship, marriages, births or deaths, what is the rule as to the admission of hearsay evidence?

In such matters, the declarations of the family or kindred are admissible as evidence, on the principle that it is the natural effusion of a party who must know the truth, and who speaks upon an occasion where he stands in an even position,

without any temptation to exceed or to fall short of the truth.
2 Wait's Law & Pr. 392; 1 Greenl. Ev., §§ 103, 104.

48. In what case are entries in the family Bible, or register, admissible as evidence?

They are evidence, if made by the father, or under his direction, and he is dead. But when such entries are recent, and the father is present in court, or can be produced there, or when the entries are made by the mother, after the father's death, and she is present in court, or can be produced, such entries will be rejected. 2 Wait's Law & Pr. 393.

49. Are dying declarations admissible as evidence on the trial of civil actions?

They are not; but are sometimes received in evidence in criminal cases. 2 Wait's Law & Pr. 393.

50. What is the rule as to the admission of declarations against interest made by persons since deceased?

It is a well-settled rule that declarations of persons, since deceased, whether the declarations were verbal or written, are admissible in those cases in which the persons making them are presumed to be cognizant of the subject-matter of the declarations, and where their declarations apparently operate against their own interest, whether pecuniary or proprietary. 2 Wait's Law & Pr. 394; 1 Greenl. Ev., § 147.

51. Upon what ground are such declarations received in evidence?

It is presumed, when declarations are made under such circumstances, that they are entitled to credit, because the regard which men pay to their own interest may be safely considered as a sufficient guaranty against their prejudicing themselves by any erroneous statement; and the assumed tendency of the declarations precludes the possibility of any fraudulent statement. 2 Wait's Law & Pr. 393, 394.

52. Suppose a witness has been sworn and examined by the parties upon the trial of an action, and he subsequently dies, is his evidence admissible in a subsequent action between the same parties, when the point in issue is the same as that in the former trial?

It is ; for the evidence in such case is not only free from the objection of being extra-judicial, or of being without oath, but the party also who is to be affected by it had the power of cross-examining the witness, under the same circumstances as on the subsequent trial. 2 Wait's Law & Pr. 395 ; 1 Greenl. Ev., § 163.

53. By whom may the proof of what the deceased witness swore be made?

It may be made by any person who heard his testimony, even though he took no minutes of the evidence. 2 Wait's Law & Pr. 395.

54. Is it necessary to prove the precise words used by a deceased witness?

It is not. Such a thing is utterly impracticable, and is no more required than it would be to give the manner and tones of voice of such witness. If the substance is fully given, it is all that can be required. 2 Wait's Law & Pr. 396 ; 1 Phil. Ev. 399, note ; 1 Greenl. Ev., § 165.

55. Give the distinction between admissions and confessions.

In our law the term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent ; the term *confession* being generally restricted to *acknowledgments of guilt*. The rules of evidence are in both cases the same. 1 Greenl. Ev., § 170.

56. How are the admissions of a party to the action regarded?

It is a general rule that the admissions of a party to the action are evidence against him ; and the statements which a party has made under oath as a witness are competent evidence

against him as an admission. 1 Greenl. Ev. § 171 ; 2 Wait's Law & Pr. 372.

57. May a party to the action be bound by the statements of a third person ?

In some cases he may. Thus, where a party is applied to for information in relation to an uncertain or disputed matter, and he refers the applicant to a third person, the answer of such third person will be competent evidence against the party making such reference. But such declarations must be strictly within the subject-matter in relation to which the reference is made, otherwise they are not evidence. 2 Wait's Law & Pr. 372, 373.

58. In what cases will the admissions of the wife bind the husband ?

In those cases only where she has authority to make them. This authority does not result merely from the marriage relation, but is a question of fact to be found by the jury, as in other cases of agency ; for, though this relation is peculiar in its circumstances, from its close intimacy and its very nature, yet it is not peculiar in its principles. The general rule is that, where a husband permits his wife to act as his agent in any particular business he adopts her acts and admissions in reference to such business, and is bound by them. 1 Greenl. Ev. § 185 ; 2 Wait's Law & Pr. 373.

59. To what extent do the admissions of attorneys or counselors bind their clients ?

Such admissions are binding in all matters relating to the progress and trial of the cause. But, to this end, they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases they are in general conclusive, and may be given in evidence even upon a new trial. 2 Wait's Law & Pr. 374 ; 1 Greenl. Ev., § 186.

60. What is the rule as to the admissions of an agent, as evidence against his principal?

The declarations, representations or admissions of an agent, which are made while acting within the scope of his authority, and in the discharge of his duties as agent, are admissible as evidence against his principal. Declarations or admissions which are not made within the scope of the agent's authority, nor while in the transaction of the business of the agency, are inadmissible; and this is especially true when the admission is made after the termination of the agency, or after the transaction by the agent is closed. 2 Wait's Law & Pr. 374.

61. Is the admission of a partner admissible as evidence against other members of the firm?

It is, in many cases; but, before such admission can be received in evidence, the existence of the partnership must be established. After a dissolution of the partnership, neither partner can make an admission which is binding upon his former partner. 2 Wait's Law & Pr. 375.

62. In what cases will the admissions of a principal be received as evidence, in an action against the surety upon his collateral undertaking?

In those cases only where such admissions are connected with the business in respect of which the surety becomes bound, and are made by the principal at the time of transacting that business. 2 Wait's Law & Pr. 376; 1 Greenl. Ev. § 187.

63. Are admissions, which are made under circumstances of restraint, receivable in evidence?

They are, provided the compulsion under which they are given is legal, and the party was not imposed upon or under duress. 1 Greenl. Ev., § 193.

64. What is the nature of implied admissions?

Admissions are sometimes implied from the assumed language, character or conduct of a party. In such cases, the existence and truth of the fact to be proved is sometimes

assumed in the expressions which are given in evidence. Thus, an agent is employed to sell goods and pays over the proceeds to his employer, and a demand is made by the latter for the money arising upon the sale of certain property. A declaration by the agent, in answer to such demand, that he had paid over all the money, is an implied admission of the sale, and dispenses with proof of that fact. 2 Wait's Law & Pr. 379.

65. *In order that an admission may have effect, in what manner must the statement containing such admission be received?*

The whole of the statement is to be received together ; and this is necessary in order that the court and jury may be enabled to judge of the true extent of the admission, which, when taken entire, will often have a different import from that which a partial account might convey. 2 Wait's Law & Pr. 381 ; 1 Greenl. Ev., § 201.

66. *In actions for a tort, are the admissions of one defendant admissible against his co-defendant?*

As a general rule, they are not, even when the wrongful act was committed by them jointly. 2 Wait's Law & Pr. 385.

67. *What is the distinction between judicial confessions and extra-judicial confessions?*

The *former* are those which are made before the magistrate, or in court, in the due course of legal proceedings. The *latter* are those which are made by the party elsewhere than before a magistrate or in court. 1 Greenl. Ev., § 216.

68. *What must be shown with reference to any confession before it can be received in evidence in a criminal case?*

It must be shown that it was *voluntary*. A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it ; and, therefore, it is rejected. 1 Greenl. Ev., § 219.

69. *What is the foundation of the rule which forbids the disclosure, in a court of justice, of all professional communications between a client and his legal adviser?*

This rule is founded on grounds of public policy ; for greater mischiefs would probably result from requiring or permitting the admission of such evidence, than from wholly rejecting it. If such communications were not protected, no man would dare to consult a professional adviser with a view to his defense, or to the enforcement of his rights ; and no man could safely come into a court, either to obtain redress or to defend himself. 1 Greenl. Ev., §§ 236-238 ; 2 Wait's Law & Pr. 512.

70. *Does this protection, which the law affords to such communications, cease with the termination of the suit, or other litigation or business, in which they were made?*

It does not ; nor is it affected by the party's ceasing to employ the attorney and retaining another ; nor by any other change of relations between them ; nor by the death of the client. The seal of the law once fixed upon them remains forever, unless removed by the party himself, in whose favor it was there placed. 2 Wait's Law & Pr. 513 ; 1 Greenl. Ev., § 243.

71. *Suppose a client makes communications to his counsel in the presence of a third person not connected with the latter, does the privilege extend to such third person?*

It does not ; and he may be compelled to testify what he has heard upon the subject. 2 Wait's Law & Pr. 513.

72. *If the communication is a privileged one, and it was made by two or more clients jointly to their mutual legal adviser, will the consent of one of them be sufficient to remove the seal of confidence?*

It will not ; nor will the consent of even a majority be sufficient ; and one or more of the clients cannot require a disclosure of the communication as evidence against the others, without their consent. 2 Wait's Law & Pr. 514.

73. Are confidential communications, made to ministers of the gospel, or to medical persons, privileged from disclosure as evidence in this State?

They are by the provisions of the Revised Statutes. See 3 R. S. 690, §§ 103, 104, (5th ed.) ; 2 Wait's Law & Pr. 514 ; 2 Wait's Pr. 659.

74. Give some other instances of cases in which evidence is excluded from motives of public policy?

Among these may be mentioned the case of judges and arbitrators ; secrets of State ; the proceedings of grand jurors ; indecent evidence, or that which is injurious to the feelings or interests of third persons ; and communications between husband and wife. 1 Greenl. Ev., §§ 249-254.

75. If papers, or other subjects of evidence have been illegally taken from the possession of the party against whom they are offered, is this a valid objection to their admissibility?

It is not ; if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question. 1 Greenl. Ev., § 254 a.

76. What is the general rule of law as to the admission of parol evidence in relation to written instruments?

It is a general and inflexible rule that whenever written instruments are appointed, either by the requirements of law or by the compact of the parties, to be repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments, or to contradict or alter them. In other words, as the rule is more briefly expressed, "parol contemporaneous evidence is inadmissible, to contradict or vary the terms of a valid written instrument." 2 Wait's Law & Pr. 453 ; 2 Phil. Ev. 350.

77. In what sense are the terms of every written instrument to be understood?

They are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as, by the known usage of trade, or the like,

acquired a peculiar sense, distinct from the popular sense of the same words; or, unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense. 1 Greenl. Ev. § 278.

78. Is parol evidence admissible in any case for the purpose of defeating a written instrument?

It is, as for example: On the ground of fraud, mistake, etc. And such evidence is admissible for the purpose of applying a written instrument to its proper subject-matter, or, to explain the meaning of foreign, local, or technical, or family terms, or to rebut presumptions arising intrinsically. 2 Wait's Law & Pr. 453.

79. What is the distinction between a patent ambiguity and a latent ambiguity?

A *patent* ambiguity is one which is apparent on the face of the instrument; a *latent* ambiguity is one which arises in the *application* of an instrument of clear and definite meaning, to doubtful subject-matter. The general rule is, that the latter species of ambiguity may be removed by means of parol evidence, while on the other hand, such evidence is not admissible to explain an ambiguity apparent on the face of the instrument. 2 Wait's Law & Pr. 455.

80. Give an illustration of the rule which allows the introduction of parol evidence for the purpose of removing a latent ambiguity?

The illustration usually given is that of a description of a devisee in a will, or a description of an estate, where it turns out that there are two persons or two estates of the same name and description. The same illustration is equally applicable to a sale of personal property. Thus, if A should agree, in writing to sell his horse to B, and there are two persons of the name of B, parol evidence is admissible to show which person was intended as purchaser. 2 Wait's Law & Pr. 455.

81. Is a receipt, merely acknowledging the payment of money, conclusive evidence of such payment?

A receipt in the form of a mere acknowledgment of pay-

ment is only *prima facie* evidence of the fact, and not conclusive; and therefore the fact which it recites may be contradicted by oral testimony. 1 Greenl. Ev. § 305.

82. *What is the true test of the ambiguity of a written instrument?*

A written instrument is ambiguous only, when found to be of uncertain meaning by persons of *competent skill and information*. Words cannot be said to be ambiguous merely because they are unintelligible to a man who cannot read; nor is a written instrument ambiguous or uncertain because an ignorant or uninformed person may be unable to interpret it. 1 Greenl. Ev. § 298.

83. *What is meant by unwritten or oral evidence?*

By such evidence is meant the testimony given by witnesses, *viva voce*, either in open court or before a magistrate acting under its commission, or the authority of law. 1 Greenl. Ev. § 308.

84. *What is a subpæna?*

A *subpæna* is a judicial writ, directed to the witness, commanding him to appear at the court to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ. 1 Greenl. Ev. § 309; 2 Wait's Pr. 717.

85. *If the witness has a document in his possession, which is required as an instrument of evidence, how may its production be effected?*

By the insertion of a clause to that effect, in the ordinary subpæna, which is then termed a *subpæna duces tecum*. A witness is as much bound to produce a document as he is to appear and give evidence. 2 Wait's Law & Pr. 549; 2 Wait's Pr. 726.

86. *Does the writ of subpæna suffice for more than one sitting or term of the court?*

It does not. If the cause is made a *remanet*, or is postponed by adjournment to another term or session, the witness must be summoned anew. 1 Greenl. Ev. § 309.

87. How must the subpoena be served?

It must be served by exhibiting to the witness the original writ ; and a copy thereof, or a ticket containing its substance, must be delivered to the witness, and the legal fees for one day's attendance ; and the traveling fees should be paid or tendered to the witness. 2 Wait's Law & Pr. 551, 552 ; 2 Wait's Pr. 720.

88. By whom may the service of the subpoena be made?

It may be served by any person, and, regularly, the proof of service of it ought to be made by the person who served such subpoena. This proof may be made, however, by any person who knows all the necessary facts of his own knowledge, by being present at the service. 2 Wait's Law & Pr. 555.

89. When a witness has been duly subpoenaed, and he makes default by not appearing, how may his attendance be procured?

By attachment ; but, before an attachment can be issued, there must be due proof made that such witness is material ; that he has been duly subpoenaed ; and that, without just cause, he has neglected or refused to attend as a witness. 2 Wait's Law & Pr. 555 ; Wait's Code, 495 ; 2 Wait's Pr. 723.

90. Is a tender of fees necessary, in criminal cases, to procure the attendance of witnesses?

It is not. Witnesses are bound to attend, for the State, in all criminal prosecutions, and for the defendant in any indictment, without any tender or payment of fees. 2 R. S. 729, § 65.

91. When the witness is legally confined in prison, how may his attendance be procured?

In such case there must be an application to the court for a writ of *habeas corpus ad testificandum*. Such application must be verified by affidavit, and must state the title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired, and that the testimony of such prisoner is material and necessary on the trial or pro-

ceeding. 2 R. S. 559, §§ 1, 2; 1 Greenl. Ev. § 312; 2 Wait's Pr. 730.

92. Suppose a witness resides abroad, out of the jurisdiction of the court, and refuses to attend, or is sick and unable to attend, how may his testimony be obtained?

In such case his testimony can be obtained only by taking his deposition before a magistrate, or before a commissioner duly authorized by an order of the court where the cause is pending, and, if the commissioner is not a judge or magistrate, it is usual to require that he be first sworn. 2 Wait's Law & Pr. 563; 1 Greenl. Ev. § 320; 2 Wait's Pr. 681.

93. At common law, what classes of persons are excluded from being witnesses, on the ground of incompetency?

1. Parties to actions; 2. Persons deficient in understanding; 3. Persons insensible to the obligations of an oath; 4. Persons whose pecuniary interest is directly involved in the matter in issue. 1 Greenl. Ev. § 327.

94. What important changes have been made in this State by statute in relation to the competency of witnesses?

Under the Code of Procedure, a party to an action may now be examined as a witness; and no person offered as a witness shall be excluded by reason of his interest in the event of the action. Wait's Code, 739, 743; 2 Wait's Pr. 655.

95. Is a person in this State rendered incompetent as a witness on account of any opinions he may entertain on matters of religious belief?

He is not. N. Y. State Const. of 1846, art. 1, § 3. But, notwithstanding the constitution makes all persons competent witnesses, whether they are believers in a Supreme Being, or are atheists or infidels, yet a party against whom a witness is called may interrogate him on his cross-examination as to his opinions on matters of religious belief, and may show by him, if he can, that he does not believe in the existence of a God, who will punish false swearing; and if he entertains such a belief, the jury may take that fact into account in estimat-

ing the credit which should be given to the witness. 2 Wait's Law & Pr. 370.

96. Is there any precise age at which children are competent witnesses?

There is not. At the age of fourteen they are presumed to be competent, and those who are younger than that will be sworn, if they are really competent. Thus, children of seven, eight or nine years of age are frequently sworn. If the child, being a principal witness, appears not yet sufficiently instructed in the nature of an oath, the court will, in its discretion, put off the trial that this may be done. 2 Wait's Law & Pr. 368; 1 Greenl. Ev. § 367; 2 Wait's Pr. 658.

97. If a person in this State has been sentenced, upon a conviction for felony, is he afterward competent as a witness?

He is not, unless he be pardoned by the governor, or by the legislature, except in the cases specially provided by law. If the conviction was for perjury a pardon does not restore competency, nor can it be restored by any thing less than a reversal of the judgment. 3 R. S. 988, § 33 (5th ed.); 2 Wait's Law & Pr. 369; 2 Wait's Pr. 657.

98. At what time ought objections to the competency of a witness be taken?

They ought to be taken before he is sworn in chief, especially if the ground of objection is known at that time. In such a case, if no objection is taken before the examination of the witness, his evidence will be considered as admitted by consent. 2 Wait's Law & Pr. 470.

99. How does the law provide for securing the purity and truth of oral evidence?

By requiring it to be delivered under the sanction of an oath. This imposes the strongest obligation upon the conscience of the witness to declare the whole truth that can be devised by human wisdom; since a willful violation of the truth exposes him at once to temporal and to eternal punishment. 2 Wait's Law & Pr. 472; 1 Greenl. Ev., § 328.

100. *What is an oath?*

An oath is a declaration made according to law, before a competent tribunal or officer, to tell the truth ; or it is the act of one who, when lawfully required to tell the truth, takes God to witness that what he says is true. 2 Wait's Law & Pr. 472.

101. *How is the act or ceremony of taking an oath usually performed?*

By laying the hand upon and kissing the gospels. But this is not strictly necessary, for in place of this the witness is allowed, if he prefers it, to swear by lifting up the right hand, and in some cases without any manual act whatever. By the principles of the common law, no particular form is essential to the oath, and, therefore, every witness is now sworn according to the form which he holds to be the most solemn, and which is sanctified by the usage of the country or of the sect to which he belongs. 2 Wait's Law & Pr. 472.

102. *What is the regular manner of conducting the examination of witnesses?*

The examination is conducted orally in open court, under the regulation and order of the judge, and in his presence and that of the jury, and of the parties and their counsel. The witness, being duly sworn, is first examined by the party producing him, which is called his *direct examination*. The adverse party is then at liberty to examine him, which is called a *cross-examination*; after which the party who called him may examine him again, which is a *re-examination*. 2 Wait's Law & Pr. 477; 1 Greenl. Ev., § 433.

103. *What are leading questions?*

Leading questions are such as suggest to the witness the answer desired. Questions are also objectionable as *leading*, when they embody a material fact, and admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggested. 2 Wait's Law & Pr. 500; 1 Greenl. Ev., § 434.

104. *Is it allowed to put leading questions to a witness in his direct examination?*

As a general rule, it is not ; but as the rule proceeds partly on the supposition that the witness is favorable to the party who calls him, its strictness is relaxed whenever it clearly appears that the witness is hostile, or that a more searching mode of examining him is necessary to elicit the truth. 1 Greenl. Ev., § 434 ; 2 Wait's Law & Pr. 501.

105. *What is the rule as to the use of leading questions on the cross-examination of a witness?*

On a cross-examination greater latitude is given to counsel than in the original examination, and the witnesses may be led immediately to the point on which their answers are required. If they betray a zeal against the cross-examining party, or show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions. There can be no danger of leading too much where the witness is obstinately determined not to follow. 2 Wait's Law & Pr. 504.

106. *Under what circumstances may a witness be permitted to refresh and assist his memory by the use of a written instrument?*

This is permitted in three classes of cases : First, when the writing serves merely to revive or assist the memory of the witness. Second, where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct. Third, when it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which, nevertheless, enables him to swear to a particular fact, from the conviction on his mind on seeing a writing which he knows to be genuine. 2 Wait's Law & Pr. 506 ; 2 Greenl. Ev., § 437.

107. *When a party offers a witness in proof of his cause, will he afterward be permitted to impeach the general reputation for truth of such witness?*

He will not ; for in offering the witness, he thereby, in

general, represents him as worthy of belief ; and to permit a party to produce general evidence to discredit his own witness, would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him. 2 Wait's Law & Pr. 524.

108. *If either party to an action calls his adversary as a witness, can he impeach the general character of such witness?*

He cannot ; nor can he show that he has made contradictory statements. The same rules are applicable here, which apply to other witnesses. 2 Wait's Law & Pr. 524.

109. *What exceptions are there to the rule disallowing a party to impeach his own witness?*

Among these may be mentioned the case, where the witness is not one of the party's own selection, but is one whom the law obliges him to call, such as the subscribing witness to a deed, or a will, or the like. So, when a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses. 2 Wait's Law & Pr. 524 ; 1 Greenl. Ev., § 443.

110. *In what way may the credit of a witness for the adverse party be impeached?*

There are several modes ; but it may be remarked generally, that the credit of a witness may be impeached either by cross-examination, or by general evidence affecting his credit, or by evidence that he has before said or done that which is inconsistent with his evidence on the trial ; or, lastly, by contrary evidence as to the facts themselves. 2 Wait's Law & Pr. 515.

111. *Will a party be allowed to adduce evidence to confirm the character of a witness before the credit of such witness has been impeached?*

He will not ; either upon cross-examination, or by the testimony of other witnesses ; but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the

character of the witness by general evidence of good conduct. 2 Wait's Law & Pr. 522.

112. *Is it any corroboration of the testimony of a witness to show that he has previously made declarations out of court, corresponding with the evidence given by him on the trial?*

It is not ; and, therefore, such declarations ought not to be received in evidence. And this is the rule, even when an attempt has been made to impeach the witness by showing that he has made contradictory statements out of court. 2 Wait's Law & Pr. 523.

113. *In what classes of cases is it the privilege of witnesses in not being compellable to answer ?*

First, where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge ; and he may claim the protection of the court at any stage of the inquiry, whether he has already answered the question in part or not at all. Second, where the answer will subject the witness to a forfeiture of his estate. Third, where the answer has a direct tendency to degrade the character of the witness. 2 Wait's Law & Pr. 508-511 ; 1 Greenl. Ev., §§ 451-454.

114. *Will a competent witness in a cause be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit ?*

He will not in this State. 3 R. S. (5th ed.) 690, § 102. But this provision is in no way construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses. 1 Greenl. Ev., §§ 451-454.

115. *Have counsel a right to put questions which might call for a criminating answer from a witness ?*

They have ; but after the question is put, it is then for

the witness to claim his exemption from answering, or to waive it and answer the question. 2 Wait's Law & Pr. 510.

116. As instruments of evidence, into what classes are writings divisible?

First, into *writings* of a public nature; secondly, of a mixed nature, partly public and partly private; thirdly, of a private nature. Public writings, again, are either judicial, or, secondly, not judicial; and, with a view to their means of proof, they are either, first, of record; or, secondly, not of record. 2 Wait's Law & Pr. 418; 2 Wait's Pr. 638.

117. Of what do public writings consist?

They consist of the acts of public functionaries, in the *executive, legislative, and judicial* departments of government, including, under this general head, the transactions which official persons are required to enter in books or registers in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. And to the same head may be referred the consideration of documentary evidence of the acts of State, the laws and judgments of courts of foreign governments. 1 Greenl. Ev., § 470.

118. How may the statute law of another State or of a foreign government be proved in this State?

The proper method is the production of the printed volume, or by an exemplified copy. A printed statute book of a sister State, in order to be admissible as evidence, must purport to have been printed by authority of such State. Wait's Code, 777; 2 Wait's Pr. 639.

119. What is the manner of proving the unwritten or common law of any other State or foreign government?

The unwritten or common law of any other State or territory or foreign government, may be proved as facts by parol evidence, and the books of reports of cases adjudged in these courts may also be admitted as presumptive evidence of such law. Wait's Code, 776.

120. How may records be proved ?

A record may be proved either (1) by mere production, without more ; or, (2) by copy. Copies of records are either exemplifications ; or, (2) copies made by the authorized officer ; or, (3) sworn copies. An exemplification is under the great seal, or under the seal of a particular court. 2 Wait's Law & Pr. 418 ; 2 Wait's Pr. 641.

121. Upon what ground are copies of records permitted to be given in evidence ?

The reason of this permission is the inconvenience to the public of removing the original records, which may be wanted in two different places at the same time. Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. 2 Wait's Law & Pr. 419.

122. How may the existence of corporations be shown ?

The existence of corporations may be shown by certified copies of the certificate of incorporation, when such copy is duly certified by the clerk or officer with whom the original is deposited. Certificates of incorporation of the villages, or transcripts from the record thereof, certified by the county clerk with whom the originals are filed, are presumptive evidence of the facts therein stated. 2 Wait's Law & Pr. 420.

123. Where the proof of a record is by an examined copy, how must the copy be proved ?

It must be proved by one who swears that he has compared it with the original, taken from the proper place of deposit. And it is not sufficient that the witness holds the copy, while another reads the record ; there must be a change of hands, or the witness must himself read the copy with the original. 2 Wait's Law & Pr. 419 ; 2 Wait's Pr. 654.

124. How may judicial documents be divided ?

They may be divided into : 1. Judgments, decrees and verdicts ; 2. Depositions and inquisitions, taken in the course

of legal proceedings ; 3. Writs, summonses, attachments, warrants, pleadings, complaints and answers, etc., which are incident to legal proceedings. 2 Wait's Law & Pr. 422.

125. *For what purpose may a judgment or verdict be offered in evidence?*

It may be offered merely to establish the fact that such a verdict was given, or such a judgment rendered, and those legal consequences which flow from that fact ; or it may be offered with a view to a collateral purpose ; that is, not to prove the mere fact that such a judgment has been rendered, and so as to let in all the necessary legal consequences of that judgment, but as a medium of proving some fact as found by the verdict, or upon the supposed existence of which the judgment is founded. 2 Wait's Law & Pr. 423.

126. *May a judgment be admitted in evidence to establish a collateral fact, where the parties are not the same?*

It may. Thus, the record of a conviction may be shown, in order to prove the legal infamy of a witness. Or, it may be shown, in order to let in the proof of what was sworn at the trial ; or, to justify proceedings in execution of the judgment. 1 Greenl. Ev., § 526.

127. *Can a verdict and judgment in a criminal case be given in evidence in a civil action to establish the facts on which it was rendered?*

As a general rule it cannot ; for if the defendant was convicted, it may have been upon the evidence of the very plaintiff in the civil action ; and if he was acquitted, it may have been by collusion with the prosecutor. Besides, upon more general grounds, there is no mutuality ; the parties are not the same ; neither are the rules of decision and the course of proceeding the same. The same principles render a judgment in a *civil action* inadmissible evidence in a criminal prosecution. 1 Greenl. Ev., § 537.

128. *What is the general rule with respect to the proof of private writings, where the instrument is attested?*

That the "instrument must be proved by the *subscribing*

witnesses, if there be any, or at least by one of them." This has been the rule from the earliest times, and it is said to be as fixed, formal and universal as any rule that can be stated in a court of justice. In this State it admits of one exception : If a bill of exchange or a promissory note is attested by a subscribing witness, he need not be called, if it can be shown by the admissions of the party, that he executed the bill or note. 1 Greenl. Ev., § 569 ; 2 Wait's Law & Pr. 428 ; 2 Wait's Pr. 648-651.

129. What is meant by a subscribing witness ?

A *subscribing witness* is one who was present when the instrument was executed, and who, at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed not by himself, but by the party, it is no attestation ; neither is it such, if, though present at the execution, he did not subscribe the instrument at that time, but did it afterward, and without request, or by the fraudulent procurement of the other party. 2 Wait's Law & Pr. 429 ; 1 Greenl. Ev., § 569 a.

130. Is the mere fact that a written instrument came out of the possession of the adverse party, sufficient of itself to dispense with the necessity of proving the execution of the instrument ?

It is not. There is, however, an important exception to the rule, which is of great practical importance at a trial, namely : that when a party, who claims a beneficial interest under a written instrument, produces it at the trial under a notice for that purpose, he is not entitled to insist upon proof of its execution, either by the subscribing witnesses or in any other manner. 2 Wait's Law & Pr. 429.

131. How may an instrument be proved, where the evidence of none of the subscribing witnesses is producible ?

In such case, proof of the handwriting of a subscribing witness will be received ; as where such witness is dead, or incompetent to give evidence on account of insanity ; or where he is out of the country, or is beyond the reach of a *subpæna*.

which is issued by the court in which the trial is had. 2 Wait's Law & Pr. 429, 430; 2 Wait's Pr. 650.

132. When is an instrument said to prove itself?

An instrument *thirty years* old is said to prove itself, the subscribing witness being presumed to be dead, and other proof being presumed to be beyond the reach of the party. 1 Greenl. Ev., § 570.

133. Where there are several subscribing witnesses, is it necessary to call more than one of them to prove the execution of the instrument?

It is not, if one can testify to sufficient facts to make the proof; but, if he cannot prove any of the signatures but his own, the other witnesses, if living and competent to testify, and within reach of a *subpæna*, must be called, or their absence accounted for. 2 Wait's Law & Pr. 431; 2 Wait's Pr. 651.

134. Must the absence of all the attesting witnesses be accounted for before evidence of handwriting can be given?

The rule requires the absence of *all* to be satisfactorily accounted for; but it will be sufficient to prove the handwriting of one of them. 2 Wait's Law & Pr. 431; 1 Greenl. Ev., § 574.

135. If a written instrument is lost or destroyed, what is required of a party in order that he may be admitted to give secondary evidence?

He will be required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits of such proof; after which, his own affidavit is admissible to the fact of its loss. 1 Greenl. Ev., § 558.

136. How may one acquire a sufficient knowledge of the handwriting of another, so as to enable him to testify as a witness to its genuineness?

There are two modes of acquiring this knowledge: 1.

From having seen him write ; and it is held sufficient for this purpose that the witness has seen him write but once, and then only his name. The proof in such case may be very light ; but the jury will be permitted to weigh it. 2. By means of a written correspondence. If a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be permitted to speak to that person's handwriting. 1 Greenl. Ev., § 577 ; 2 Wait's Law & Pr. 433.

137. Upon what is the proof of handwriting founded in the cases just mentioned ?

It is founded upon a knowledge of its general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writings in question. A witness is not permitted, however, to compare writings in court, and, from that comparison, give his opinion as evidence upon the question of the genuineness of the signature in dispute, if the only knowledge he has is founded upon such comparison of hands. 2 Wait's Law & Pr. 433.

138. If either of the parties to a written instrument makes a material alteration in it after its execution and delivery, what effect will such alteration have upon the instrument ?

The instrument is thereby rendered void ; but to this rule there are two exceptions : one is, if the alteration was made by the consent of the other party ; and the other is, where the alteration itself is an immaterial one, or is one which consists in merely supplying words, which the law would intend in the absence of any written words. 1 Greenl. Ev., § 565 ; 2 Wait's Law & Pr. 434.

139. If, on the production of the instrument, it appears to have been altered, what is required of the party offering it in evidence ?

It is incumbent on him to explain this appearance ; and this is especially the rule when the alteration is suspicious, and is beneficial to the holder. 2 Wait's Law & Pr. 435.

140. *Does the law require that an instrument shall be written throughout with the same colored ink?*

It does not; and the fact that two kinds of ink of different colors was used will not, of itself, be sufficient to authorize a court to exclude the paper from the jury. So, if there is an erasure of one name, and another is written upon it, that of itself will not invalidate the instrument, though such circumstances may be weighed by the jury, upon the question of alterations, etc. 2 Wait's Law & Pr. 435; 1 Greenl. Ev., § 564.

141. *If an instrument is altered or destroyed by a stranger who had no authority to do so, will this in any way affect the rights of the parties to the instrument?*

It will not. In such case the existence of the original must be shown, and the alteration or destruction will authorize proof, as in the case of a lost paper, if that kind of proof is necessary. 1 Greenl. Ev., § 566; 2 Wait's Law & Pr. 436.

142. *Has the provision of the Code which permits parties to be witnesses, in any way changed the rules in relation to the admission of account books as evidence?*

It has not; for although a party may be a witness in his own favor, and may thus be able to establish his case by common-law proof, yet he is not obliged to do so, but may introduce his books of account as evidence, as formerly, provided he makes proper preliminary proofs to authorize their reception. 2 Wait's Law & Pr. 437; 1 Phil. Ev. 385, *n.*

143. *What facts does the law require to be established by the party offering account books as evidence before they will be received as such?*

1. That the party had no clerk; 2. That some of the articles charged had been delivered; 3. That the books produced are the account books of the party; 4. He must prove that he keeps fair and honest accounts, and this proof must be made by those persons who have dealt with him and have settled from those books. 2 Wait's Law & Pr. 438; 1 Phil. Ev. 375, *note.*

144. Are books of account admissible as evidence upon any subject for which a party might desire to use them ?

They are not. To aid trade and commerce was the object in view when such books were allowed to be used as evidence ; and a most important rule is, that the charges contained in them must relate to such things as are matter of book account, otherwise, they are not competent evidence. Thus, the sale of goods, wares and merchandise may be proved by such books ; but they are not competent evidence for the purpose of proving a loan of money ; nor for the purpose of proving the payment of money. 1 Phil. Ev. 439.

145. Are books of account competent evidence, in any case where there is but one single claim or charge ?

No ; and the rule is the same although there may have been several articles sold, if there was but one single transaction by way of sale. 1 Phil. Ev. 440 ; 1 Greenl. Ev., §§ 118, 119, note.

146. Is it sufficient, for a party offering account books in evidence, to prove that some goods have been sold and delivered, or that some services have been rendered ?

It is not. The law requires proof that some of the items charged have been delivered, or that some of the services charged have been rendered. 2 Wait's Law & Pr. 440, 441.

147. Does this rule require a party to prove the largest possible number of items of his account ?

It does not ; but it is always prudent to prove such a number of items as shows that there is a regular course of dealing between the parties, if such evidence is conveniently attainable. And, the greater number of items proved, the more satisfactory will the evidence be that the account books are correct. 2 Wait's Law & Pr. 441.

148. Does the law require that books of account, to be admissible in evidence, should have been kept in strict accordance with the most approved systems of book-keeping ?

The law does not require such strictness ; but the entries of charges ought to be made in those books of the party

which are employed by him for the purpose of entering his daily and usual accounts with such persons as deal with him. And they ought to be made in conformity to the prevalent manner of keeping his books. 2 Wait's Law & Pr. 441.

149. By whom may the fact be proved that the party keeps no clerk?

It may be proved by the party himself; or it may be substantiated by any one who knows that fact. Any member of the family, or any near neighbor or intimate acquaintance, or, in short, any person who is familiar with the mode in which the party transacts his business in its daily movements, may show that no clerk is employed about it. 2 Wait's Law & Pr. 444.

150. Is one witness sufficient to prove that the owner of the books keeps fair and honest accounts?

A single witness who has dealt with the party, and has settled from the books, will be sufficient proof to render the books *competent*, and, therefore, admissible in evidence; but the credit of a book is dependent upon its character, and the greater the number of persons who have found its entries accurate and just, the more reliable will such book be as evidence. 2 Wait's Law & Pr. 444; 1 Phil. Ev. 385, note.

151. How may the credit of account books be impeached?

Any evidence is proper for this purpose if it legally shows that the accounts are false and fraudulent, and if that fact is established the books will be entirely disregarded. So, too, if it is clearly shown that any of the charges are false, and that they were intentionally entered in the books for the purpose of injustice, the jury may disregard the whole book, if they see proper to do so, on the principle that a book which is deliberately and intentionally false in some things is equally false as to all the other items. 1 Phil. Ev. 445; 2 Shars. Bl. Com. 369, n.

152. If accounts are entered upon slips of paper or upon separate sheets, distinct from the usual books of account, can such slips or separate sheets be received as books of account?

They cannot. It is, however, not necessary that such

books should be bound in a substantial manner, nor need they be bound at all. Several sheets of paper folded or stitched together will be sufficient to render the book competent, so far as its form is concerned. 2 Shars. Bl. Com. 448.

153. Are accounts valid, if kept in pencil mark?

They are, if they are legible, and if that is the usual mode of keeping the general accounts. 2 Shars. Bl. Com. 448.

154. Are copies of books of account admissible in evidence?

They are not, if objected to on that ground. But, if such evidence is offered, and it is admitted in the court below, without objection, it will not be any ground of objection on appeal that a copy was used instead of the original books. 2 Shars. Bl. Com. 450.

155. Suppose a party elects to introduce his account books as evidence, may he afterward withdraw them?

Each party is at liberty to prove his books in evidence, or not, as he may choose, under ordinary circumstances. But, if he elects to introduce them as evidence, when they are once admitted, the evidence becomes the property of both parties, and the books cannot be withdrawn, nor the evidence rejected, without the consent of the opposite party. 2 Shars. Bl. Com. 450 ; 1 Phil. Ev. 385, note.

156. Upon what conditions will the opinions of a witness be received as competent evidence?

To render such evidence competent, two things should exist in the case : 1. The matter upon which it is proposed to introduce evidence of opinions must be one of *skill* or *science*; 2. The witness must be shown to possess such knowledge or skill as to render him competent to give an opinion. Where the question is not one of skill or science, opinions will not be evidence, no matter how learned or scientific the witness may be whose opinion is asked. 2 Wait's Law & Pr. 490.

157. When is the testimony of experts admissible to decipher written instruments?

If the characters are difficult to be deciphered, or the lan-

guage, whether technical or local and provincial, or altogether foreign, is not understood by the court, the evidence of *experts* is admissible to declare what are the characters, or to translate the instrument, or to testify to the proper meaning of the particular words. 1 Greenl. Ev., § 280; 2 Stark. Ev. 565, 566.

158. *Is there any exception to the rule that witnesses cannot give opinions as evidence, when the question is not one of skill and science?*

There is one important exception to the rule; for it is now well settled that any person who is acquainted with the value of the particular kind of property sold, or the kind of services rendered, may express an opinion as to its value. Thus, in an action to recover compensation for drawing leases, etc., the value of such services can be proved by the opinion of an attorney at law. So the value of a horse may be proved by the opinion of a witness. 2 Wait's Law & Pr. 495.

159. *Where the question is, as to whether a person was intoxicated at the time he did a certain act, is it competent to ask a witness who saw him at that time, whether, in his judgment, such person was to any considerable extent under the influence of intoxicating liquors?*

It is; for it does not require science or opinion to answer the question, but observation, merely, whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him, than by their description of his conduct. *People v. Eastwood*, 14 N. Y. (4 Kern.) 562.

160. *Are the subscribing witnesses to a will or deed competent witnesses as to the soundness of mind of a testator or grantor, at the time of executing the instrument, if such witnesses are not persons of science and skill?*

They are; but the opinions of no other persons are thus competent, unless they are possessed of the requisite science or skill to authorize them to express an opinion upon the subject. 2 Wait's Law & Pr. 499.

161. *Who is to decide upon the question as to the value and importance of opinions, given in evidence?*

This is a proper question for the jury; for there is no rule of law that requires jurors to surrender their judgments implicitly to, or to give a controlling influence to the opinions of scientific witnesses, however learned or accomplished they may be. *Brehm v. The Great Western Railway Co.*, 34 Barb. 273.

162. *What is the distinction between *prima facie* and conclusive evidence?*

Prima facie evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail, if it is accredited by the jury, unless it is rebutted or the contrary proved. *Conclusive* evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. 2 Wait's Law & Pr. 529.

163. *Of what does the evidence to be weighed by a jury, or by a court sitting in their place, consist in?*

(1) The direct testimony of witnesses; or, (2) indirect or circumstantial evidence; or, (3) in both, either united or opposed to each other. 2 Wait's Law & Pr. 529.

164. *Upon what does the credit due to the testimony of witnesses depend?*

It depends: (1) upon their integrity and honesty; (2) their ability; (3) their number, and the consistency of their testimony; (4) the conformity of their testimony with experience; and, (5) the coincidence of their testimony with collateral circumstances. 2 Wait's Law & Pr. 529.

165. *Is the testimony of a single witness sufficient legal ground for relief?*

It is, where there is no ground for suspecting either the ability or integrity of the witness. Where direct testimony is opposed by conflicting evidence, or by ordinary experience, or by the probabilities of the case, the consideration of the *number* of witnesses becomes most material. 2 Wait's Law & Pr. 532.

166. *How may a party obtain an admission of the genuineness, or an inspection of writings under the Code?*

Under the Code, a party may be required to admit a paper to be genuine, or pay expense of proving it; and if a party satisfactorily establishes the fact that any document is in the possession or under the control of the adverse party relating to the merits of the prosecution or defense, the court may order its inspection. Wait's Code, 735; 2 Wait's Pr. 653.

167. *May the production of the books, etc., of a corporation be compelled by means of subpæna duces tecum?*

No. The proper remedy of a party entitled to use the books of a corporation as evidence, is an application under the Code or the Revised Statutes. Wait's Code, 736-740.

168. *Where the defendant in an action is a corporation, can the plaintiff have an order for the examination of such defendant as a witness by its officers?*

He cannot. The provisions of the Code authorizing a party to examine his adversary as a witness, do not extend this authority to the examination of the agents, officers or servants of parties to a suit; and the examination of a corporation as a witness was not within the intent of the legislature. Wait's Code, 740.

169. *In the trial of an indictment against a person charged with a criminal offense, is such person a competent witness in this State?*

He is, if he requests to be sworn as a witness, but not otherwise; but the neglect or refusal of such person to testify will not be allowed to create any presumption against him. Wait's Code, 743; Laws of 1869, ch. 678.

170. *Is the husband or wife of a party to an action a competent witness in such action?*

By statute, in this State, the husband or wife of any party to an action, or legal proceeding, is competent and compellable to give evidence the same as any other witness. But no husband or wife is competent or compellable to give evidence for or against the other in any criminal action or proceeding; nor

can either be compelled to disclose any confidential communication made by one to the other during their marriage. Wait's Code, 739; Laws of 1867, ch. 887, § 1.

171. *If a material witness is about to depart from the State, or is so sick and infirm as to afford reasonable grounds for apprehension that he will not be able to attend the trial, how may his testimony be obtained?*

In such case, either party to the action may have the testimony of the witness taken conditionally in the manner prescribed by statute. And it is of no importance whether the witness is a resident of the State or not, nor whether he is a transient person or has a fixed residence. 2 R. S. 391. See Laws of 1851, ch. 472, p. 871; Wait's Code, 756; 2 Wait's Pr. 660.

172. *If a witness has been duly subpœnaed to attend a trial, what liabilities does he incur by a refusal or inexcusable neglect to do so?*

He thereby subjects himself to a liability for a fine, as well as the payment of all damages which may be sustained by the party who subpœnaed him. Before an action will lie, however, it must be made to appear that the witness was a material one, and that the failure to try the cause, or the defeat of the party, arose from the absence of such witness. 2 Wait's Law & Pr. 553; 2 Wait's Pr. 722.

173. *Is a party to an action entitled to charge fees as a witness?*

He is not, unless he attended the trial solely as a witness, and not for the purpose of superintending the trial of the cause. So one defendant cannot tax witnesses' fees for the attendance of a co-defendant, unless he attended expressly and solely as a witness. 2 Wait's Law & Pr. 552; Wait's Code, 624.

174. *Is an attorney or counsel in a cause allowed any fee for attending as a witness in such cause?*

He is not; but, if counsel attend in good faith as a witness, and is retained as counsel, after he arrives at the place

of trial, his fees are taxable. And an attorney may charge a *per diem* allowance for the day on which he was sworn, but not for the mileage. Wait's Code, 623.

175. *What is the statutory rule in this State as to the exemption from arrest of a witness duly subpœnaed to attend any court?*

Such witness is exonerated from arrest in any civil suit, while going to the place which the subpœna requires him to attend, while remaining at such place and while returning therefrom. Every such arrest is absolutely void, and subjects the person who makes it to a liability of three times the amount of damages assessed by a jury, as well as to all other damages which may result from loss or hindrance caused by such arrest. 2 Wait's Law & Pr. 554.

176. *Does this privilege from arrest extend to the case of one who voluntarily attends as a witness, without having been duly served with a subpœna?*

It does not ; and this is the rule even in those cases in which a witness was first examined, after being duly subpœnaed and then discharged, but subsequently appeared voluntarily to answer further in the cause. But, if a witness from another State attends voluntarily as a witness, and in good faith, solely to testify as a witness, he will be protected from arrest. 2 Wait's Law & Pr. 555.

177. *How may the attendance of witnesses be compelled before a referee?*

A referee upon the trial of a cause may compel the attendance of witnesses before him by attachment, and may punish them as for a contempt for non-attendance, or refusal to be sworn, or to testify, in the same manner as the court. Wait's Code, 495.

178. *If books and papers are produced by a witness in obedience to a subpœna duces tecum, can they be used for any other purpose than that of evidence?*

They cannot ; nor can they be taken from the possession of the witness thus subpœnaed. Wait's Code, 496.

179. *Can a party be required, by the process of subpæna duces tecum, to produce a chattel in relation to which an action is pending?*

He cannot ; for this process does not require a party to produce any thing but books, papers, documents, etc. 2 Wait's Law & Pr. 550.

180. *Suppose a witness, at the time of being sworn, has in his possession a document executed by the parties to the action which is required in evidence, is he bound to produce it, notwithstanding he has received no notice to produce it, nor been served with a subpæna duces tecum?*

He is ; but the rule is otherwise as regards a chattel in the possession of such witness. 2 Wait's Law & Pr. 405, 550.

181. *What effect has the refusal of a party to produce a paper, in obedience to a notice to produce?*

The only effect of such a refusal is to enable the party giving such notice to give oral evidence of the contents of such paper, and that, if such evidence is imperfect, every presumption is against the party refusing to produce. 2 Wait's Law & Pr. 404, 408, 550.

182. *How would you enforce the attendance of a witness on a conditional examination, or on proceedings to perpetuate testimony?*

In either case by means of a summons, which must be issued and signed by the judge before whom the witness is to be examined ; and the attendance of a party on an examination as such, before trial, is to be enforced in the same way. Wait's Code, 741.

CHAPTER XX.

MISCELLANEOUS AND MOOT QUESTIONS.

1. *A traveler, returning home from New York, purchased and checked over the New York Central Railroad, as baggage, a trunk and contents, consisting of wearing apparel for himself and family, and also certain presents for his friends. No part of the contents of the trunk were necessary to the comfort or convenience of the traveler during his journey home. The trunk and contents were lost. Can the traveler recover from the railroad company the value of the trunk and contents?*

He can, with the exception of the presents purchased for his friends. See 1 Wait's Law & Pr. 356; *Dexter v. Syracuse, Binghamton & New York Railroad Co.*, 42 N. Y. (3 Hand) 326; S. C., 4 Am. R. 527.

2. *A, being a creditor of an insolvent firm, entered into a written agreement with his debtor to accept, in satisfaction and discharge of the debt, a sum less than the full amount due, provided that no other creditor of the firm should receive more than a like per cent of his claim. After the payment of the stipulated sum, A brought an action to recover the balance of his claim. Can he recover?*

He can, as the agreement is void for want of consideration. *Perkins v. Lockwood*, 100 Mass. 249; S. C., 1 Am. R. 103.

3. *A loaned certain shares of stock to B, taking as a memorandum of the transaction and by way of security for the return of the stock, B's promissory note. The note was made payable to A, or order, with interest, on demand. Three months afterward, A transferred the note to C, who brought an action upon it. Prior to the commencement of such action, B tendered the stock to A, and demanded the return of the note, which was refused. All of the parties were residents of the same city, and carried on business in the same street. Can B set up, as a defense to the action, the equities existing between him and A?*

He can, as the note was past due when transferred, and

is, therefore, subject to all the defenses that would have been available in an action between the original parties. *Herrick v. Woolverton*, 41 N. Y. (2 Hand) 581; S. C., 1 Am. R. 461; and see 1 Wait's Law & Pr. 401, 437, 458.

4. What persons are incompetent to serve as executors, under existing statutes?

All persons who, at the time the will is proved, are, 1. Incapable, in law, of making a contract (except married women); 2. Under the age of twenty-one years; 3. Aliens not being inhabitants of this State; 4. Who shall have been convicted of an infamous crime; 5. Who, upon proof, shall be adjudged by the surrogate to be incompetent to execute the duties of an executor by reason of drunkenness, dishonesty, improvidence or want of understanding. Laws of 1873, ch. 79.

5. In what manner may the wishes of the testator, as to the disposition of his estate, be carried into effect, when the person named as sole executor in the will, or all the persons named as executors, are incompetent?

In that case letters of administration (with the will annexed) must be issued in the manner directed by statute, in cases where all the executors named in a will renounce the office. Laws of 1873, ch. 79. See Willard on Ex. & Surr. 141.

6. A, wishing to obtain a better supply of water for the use of his family and stock, began digging a well upon his own land, thereby intercepting and preventing the flow of an underground current of water into a large and valuable spring, situated on the land of an adjoining owner, which supplied a village with water. An action was brought by the village for a perpetual injunction to restrain A from digging the well. Can the action be maintained?

It cannot. *Village of Delhi v. Youmans*, 45 N. Y. (6 Hand) 362; S. C., 6 Am. R. 100; 2 Wait's Pr. 63, 64.

7. *A, having an offer to sell his interest in an oil well, telegraphed to his agent in Pennsylvania, inquiring what the well was yielding. The company were not informed, by the contents of the message or otherwise, that extraordinary speed or care in the transmission or delivery of the message was important, or that extraordinary damages would result from any negligence on the part of the company. The message was not delivered to the agent for several days, during which time A had sold his interest for \$3,500. Immediately after the sale, A received a telegram from his agent, stating that he could sell the interest for \$5,000. What damages can A recover from the telegraph company on the facts stated?*

He can recover only the loss which would naturally and necessarily result from a failure to deliver the message, which would be the amount paid for its transmission. *Baldwin v. United States Telegraph Company*, 45 N. Y. (6 Hand) 744; S. C., 6 Am. R. 165.

8. *A traveler, while passing along the street of a city, was injured by the falling of a sign, projecting over the sidewalk. Notice had previously been given to the city authorities that the sign was insecurely fastened to the building from which it fell. Against whom should an action be brought to recover the damages so received?*

The action should be brought against the owner or occupant of the building, and not against the city. *Jones v. Boston*, 104 Mass. 75; S. C., 6 Am. R. 194; *Taylor v. Peckham*, 8 R. I. 349; S. C., 5 Am. R. 578.

9. *If goods are shipped by express to a given place, marked in care of the agent of the express company at that place, can the company be held liable for their loss after their arrival at their destination and delivery to the agent?*

They cannot. The owner of the goods, by marking them in care of the agent of the company, made him his own agent for receiving the goods; and the owner, knowing the fact of the prior agency, is estopped from pleading the rule that the same person cannot be the agent of two principals. *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330; S. C., 2 Am. R. 577; and see 1 Wait's Law & Pr. 239.

10. *A promissory note was executed January 1, 1869, but, by mistake, was dated January 1, 1868. After its delivery to the payee, the date was changed to January 1, 1869, without the knowledge or consent of the maker. In an action against the maker of the note, this alteration was pleaded as a defense. Can the holder of the note recover, notwithstanding the admission of the facts set up by the defendant?*

He can. The general rule that the material alteration of a note, after its execution and delivery, will render it void, does not apply where the alteration is made to make the instrument conform to what all parties to it agreed or intended it should have been. Pars. on Bills & Notes, 569-571; 1 Wait's Law & Pr. 910; *Duker v. Franz*, 7 Bush (Ky.), 273; S. C., 3 Am. R. 314.

11. *A, being indebted to B in the sum of \$200, B commenced an action thereon for the purpose of inducing A to set up, in his answer, as a counter-claim, a debt of \$500, due from B to A, which would in ten days become barred by the statute of limitations. A, having no defense to the claim of B, pleaded as a counter-claim the debt due from B, asking for affirmative relief. Instead of replying to the counter-claim, B asked leave to discontinue, on payment of costs. Has he a right to the relief demanded?*

He has not. Where a new action on the counter-claim would be barred by the statute of limitations, the plaintiff will not be allowed to discontinue his action. 2 Wait's Pr. 601.

12. *What is the legal definition of "adoption," as the term is used in respect to minor children?*

Adoption is the legal act whereby an adult person takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of a parent in respect to such minor. Laws of 1873, ch. 830, § 1.

13. *The consent of what parties is necessary to the legal adoption of a minor child?*

1. The consent of the child, if over the age of twelve years;

2. The consent of the wife of the person adopting the child, if a married man and not legally separated from his wife, or the consent of the husband, if the party adopting is a married woman and not lawfully separated from her husband ; 3. The consent of the parents of the child, if living, or of the survivor, if one is dead ; or, if the child is illegitimate, the consent of the mother, if living. Laws of 1873, ch. 830, §§ 3, 4, 5.

14. When is the consent of the parents of the child unnecessary to its adoption ?

It is unnecessary to obtain the consent of a father or mother deprived of civil rights, or adjudged guilty of adultery or cruelty, and who is divorced for either cause, or is adjudged insane or an habitual drunkard, or is judicially deprived of the custody of the child on account of cruelty or neglect. Laws of 1873, ch. 830, § 6.

15. What judicial proceedings are necessary to the legal adoption of a child ?

The person adopting the child, the child adopted, and all persons whose consent is necessary, must appear before the county judge, execute the necessary consents and agreements, and obtain an order of the judge, after the examination of all parties separately, directing that the child be thenceforth regarded and treated in all respects as the child of the person adopting it. Laws of 1873, ch. 830, §§ 8, 9.

16. A guest, arriving at an inn, placed his horse and carriage in the care of the innkeeper, requesting that they be properly stored and cared for at the stable connected with the inn. During the night the stable was fired by an incendiary and consumed, with its contents. Is the innkeeper liable to the guest for the property so destroyed ?

He is not. The statute exempts the innkeeper from liability for losses so occurring without fault or negligence on his part. 2 Wait's Law & Pr. 1200 ; Laws of 1866, ch. 658.

17. A valuable watch and chain were stolen from the room of a guest at an inn. The proper notice to guests, that a safe was provided for the reception of money, jewels and ornaments, was conspicuously posted in the room from which the watch was taken. Is the innkeeper liable for the loss?

He is. The act of 1855 limits the exemption of the innkeeper who complies with its condition to the particular species of property named, and, being in derogation of the common law, cannot be extended in its operation and effect by doubtful implication, so as to include property not fairly within the terms of the act. *Ramaley v. Leland*, 43 N. Y. (4 Hand) 539; see 1 Wait's Law & Pr. 341.

18. Does the legal obligation of a parent to support his minor children depend upon the common or statute law?

The obligation depends wholly upon statutory enactments, and has no existence independent of them. *Kelly v. Davis*, 49 N. H. 176; S. C., 6 Am. R. 499.

19. An anti-nuptial contract was entered into in one State, to be carried into execution in another. Questions arose under the contract as to the capacity of the parties to contract, as to the form of the contract, and as to its effect. How will the law of place affect these questions, in an action on the contract, in the State where it is to be carried into effect?

The questions as to the capacity of the parties to contract, and as to the form of the contract, must be determined by the law of the place where the contract was made, while all questions as to the effect of the contract must be determined by the laws of the State where it is to be carried into execution.

20. Is it necessary for a principal to show fraud on the part of his agent, in order to maintain an action against him for neglecting to perform a duty which he has undertaken?

It is not, as the agent is bound to the exercise of not only good faith, but also reasonable diligence, and such skill as is ordinarily possessed by persons of common capacity engaged in the same business. See Story on Agency, §§ 183, 186; 1 Wait's Law & Pr. 231, 240.

21. *A mutual will is executed by husband and wife, devising reciprocally to each other. Is the will valid, and, if so, how does it operate?*

The will is valid, and operates as the separate will of whichever dies first. 1 Redf. on Wills, 182; see Willard on Ex. & Surr. 60.

22. *A, being arrested on a criminal charge, B and C joined with him in executing a bond for his appearance at the next session of the court of oyer and terminer, to answer to the indictment. While at large on bail, A was taken to another State, under a requisition from the governor of that State, to answer for a crime committed there, and was there imprisoned at the sitting of the court before mentioned. Will the fact that the principal was so confined until after the day for his appearance constitute a good defense to an action on the bond?*

It will. The performance of the condition of the bond had become impossible by act of the law. 1 Wait's Law & Pr. 935; 2 id. 1147, note 479.

23. *An action was brought in this State against the indorser of a promissory note, made and indorsed in blank, in the State of Connecticut, where it was payable. Upon the trial the indorser offered evidence of a special parol agreement that the indorsement was only for collection. Such evidence is admissible under the laws of Connecticut, but inadmissible under the laws of New York. Which must control, the lex loci contractus or the lex fori?*

The *lex fori* governs as to the proof of the contract; the *lex loci contractus* as to the obligations of the contract. The evidence was inadmissible. Story's Confl. of Laws, § 342; 2 Pars. on Notes & Bills, 326; see 1 Wait's Law & Pr. 427.

24. *Can a tenant in common, by his sole act, create an easement in the premises of which he owns no more than a right held in common with others?*

He cannot, even by his express grant; nor can a tenant in common, who owns other premises in severalty, so use such premises as to create, for the benefit thereof, an easement in

the property held in common. *Crippen v. Morss*, 49 N. Y. (4 Sick.) 63.

25. Does the naming of a bank, as the place of payment in a promissory note, make the banking association an agent for the collection of the note, or the receipt of the money?

It does not. No power, authority or duty is thereby conferred upon it in reference to the note.

26. A agrees to sell property to B, and C contracts to purchase the same property from B; but, before the title passes to B, C induces A to sell the property to him instead. Does C thereby become liable in an action to B?

He does not, provided he be guilty of no fraud or misrepresentation. A alone, in such case, must respond to B for the breach of his contract, and B has no legal claim upon C. *Ashley v. Dixon*, 48 N. Y. (3 Sick.) 430.

QUESTIONS FOR THE MOOT COURT.

1. A purchased certain property of B, and gave his note for the purchase-money, C signing the same as surety. Ten days thereafter, A paid B \$100 upon the note, which payment was neither indorsed upon the note nor credited to A. B subsequently brought an action upon the note against A and C, as maker and surety. No defense being made to the action, B recovered judgment for the full amount of the note, and issued execution thereon. C paid this judgment, and, taking an assignment of A's claim, brought an action to recover back the \$100 paid upon the note. Can the action be maintained?

2. On the 5th day of April, 1860, A, being a common carrier of passengers, agreed to carry B from New York to Liverpool, by the steamship Morning Light, which was advertised to sail for the latter port on the 20th of that month. Two days prior to the making of this agreement, the Morning Light had been wrecked by a storm at sea, and gone down in mid-ocean, a fact of which both parties to the agreement were ignorant. On the 20th of said month, and after the loss of the vessel had been for some days known, B demanded passage to Liverpool

in accordance with his contract. A refused to perform his contract, alleging as an excuse that performance had been rendered impossible by the act of God, whereupon B demanded that passage should be furnished him in another vessel, belonging to a third party, which was advertised to sail upon the following day. This demand was also refused, whereupon B brought an action against A for the damages resulting from a breach of the contract. Can B recover in the action?

3. By certain articles of agreement, entered into on the 1st day of January, 1866, A agreed to sell to B a certain parcel of land, described therein, for the sum of \$5,000, and to execute and deliver to B a proper deed of conveyance of said premises, upon the 1st day of May, 1868, on the receipt of \$4,000, the balance of the purchase-money, B paying \$1,000 at the time of entering into the agreement. The premises described in this agreement were sold for non-payment of taxes, in March, 1867. On the 5th day of May, 1868, B commenced an action against A, to recover back the purchase-money paid, without a previous demand for its repayment, and without any tender of performance on his part or demand of the deed. Can he recover in the action?

4. A, wishing to effect an insurance upon his life, makes application for a policy to an agent of a life insurance company, having general authority from the company to make out and forward applications for insurance, to deliver to the assured policies when returned, and to collect and transmit premiums. A, in answer to certain printed questions, makes untrue and fraudulent statements of facts material to the risk. The agent, knowing the falsity of such statements, receives the application and premium, forwards the same to the company, and delivers to A the policy issued by the company thereon. The policy contained the following reference: "It is understood and agreed by the assured to be the true intent and meaning hereof, that, if the declaration made by or for the assured, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void." Upon the death of A, the owner of the policy brought an action against the company to recover the

amount of the policy. The company defend the action upon the ground that the policy was procured through fraud. Can a recovery be had upon the policy?

5. A and B are partners in trade, and, as such, became indebted to C for goods sold and delivered to them. For the purpose of discharging this indebtedness, A makes a check, in the firm name, payable to C, or bearer; but C, being indebted to A individually, A retains the check, and discharges the firm debt by paying in cash to C the amount of the firm debt, less the amount due to A from C. A subsequently transfers this check to D, in payment of an individual debt, and, the check not being paid on presentation at the bank, D brings his action thereon against the firm. Can he recover?

6. A, being an innkeeper, entered into an agreement with his hostler to the effect that the latter should have the profit of the stables, without paying rent, the hostler providing the hay, oats, etc., and supplying the same to the animals left in his charge, not only by the guests of the inn, but also by the residents of the town. B, having no knowledge of this arrangement, arrives at the inn kept by A, and becomes a guest, leaving his horse in the care of the hostler. Upon the following day, B departs for a neighboring city, saying that he should not be back for several days, and requesting that his horse should in the mean time be well cared for. B was absent a fortnight, and, during this time, the hostler, under the pretense of exercising the horse, drove it near a locomotive, at which it took fright, ran away and was fatally injured. B thereupon brought an action against A for the value of the horse. Can he recover?

7. A, having purchased a country residence on the shore of a lake, obtained from B, an adjoining owner, a parol license to erect upon the land of the latter a building to be used as a pleasure house, boat house, etc. The building was completed and occupied by A during the following summer. Subsequently the land was mortgaged by B to C, no notice being given of the prior license. The mortgage debt becoming due and being unpaid, C foreclosed the mortgage and bid in the

land at the sale. A, not being a party to the foreclosure suit, commenced to remove the building erected by him, from the land thus purchased by C. C forbid the removal, and filed his complaint in the supreme court, asking to have either damages for its removal or a perpetual injunction against it. Is he entitled to either form of relief?

8. A agreed to sell to B some soap and candles, and to take, as part payment therefor, some damaged candles. B pointed out the damaged candles to the clerk of A, and ordered the soap sent and the damaged candles to be taken away. Before the completion of the delivery of either article, B made an assignment to C for the benefit of creditors. C sold the damaged candles to D, whereupon A brought an action against D to recover the candles so purchased. Can the action be maintained?

9. A delivered to a telegraph company at Washington, D. C., a message, to be sent to his agent in New York city, as follows : "If we have any old Southern on hand, sell same before the board ; buy five Hudson at board ; quote price." The agents received instead this message : "If we have any old Southern on hand, sell same before board ; buy five hundred ~~at~~ Michigan stock before the morning board, and bought five hundred shares of the same at the board, and the same day notified A by telegraph of the purchase and price. A then sent another message, canceling the purchase, and directing the purchase of Hudson River stock. This message was not received by the agents until after the board had adjourned, whereupon they sold on the street the Michigan Southern stock for \$475 less than they had paid at the board, and bought Hudson River stock, paying therefor \$1,375 more than the average price of the same at the board in the morning ; whereupon A brought an action against the telegraph company to recover the damages sustained by him by reason of the improper transmission of the message, demanding judgment for \$1,375, the difference between what was paid for the Hudson River stock and the average price at the board, and also for \$475, the amount lost on the five hundred shares of the Michigan Southern stock.

sold after the board adjourned. What damages, if any, is A entitled to recover in the action?

10. A owned a house and lot worth \$12,000, of which B held a lease for two years. Three months after B went into possession, A, wishing to go to a foreign country, and being in need of funds, borrowed of C, for the term of three years, \$6,000, giving C, as security therefor, a deed of said premises, with the usual covenants of warranty, C at the same time executing an agreement providing for a reconveyance of the premises upon the repayment of the loan and interest. The deed was duly recorded, while the agreement to reconvey was not. During the same year C conveyed the premises to D, who immediately conveyed the same to E. D took the premises with full knowledge of the circumstances attending the original conveyance of the property to C by A, but E purchased without notice. E, wishing to take immediate possession of the property and make improvements, procured an assignment of B's lease and went into possession, paying the amount of rent due for the balance of B's term to the agent of A. A, after an absence of three years, returned, tendered C the amount of his loan, with interest, and demanded a reconveyance of the property, which C was unable to make. A, at the same time, brought an action against E for the rent of the premises from the date of the expiration of B's lease, on the theory that E was his tenant, holding over under an implied contract to pay rent. Can A recover in this action?

11. An action was brought upon the following instrument: “\$600. NEW YORK, Nov. 4, 1870. Nine months after date, for value received, I promise to pay John Hough, or bearer, \$600 in good merchantable wheat, at \$1.50 per bushel, at the store of Lane, Son & Co., with seven per cent per annum interest from date. THOMAS DUNN.” On the back of this instrument were written the following words: “Chicago Elevator Company, by Henry Willson, President.” Thomas Dunn and the Chicago Elevator were both made defendants in the action. Dunn did not appear. The complaint alleged the making of the agreement, the indorsement by the company, and default in performance. The answer set up a general

denial. Upon the trial it was proved that Dunn executed the agreement, that the defendant's company indorsed the same, and that default had been made in its performance. Whether the indorsement was made at the time of the execution of the agreement, or whether the company received any consideration therefor, was not established by evidence. Should the court render judgment against all the defendants in this action?

12. A entered into a parol agreement for the sale of two thousand bushels of wheat to B, at \$1.81 per bushel, to be delivered during the following month. No part of the wheat was delivered when the contract was made, nor was any part of the purchase-money paid. At the expiration of the time for the delivery of the wheat, the market price of wheat was \$2 per bushel, and A, not being able to deliver it according to agreement, executed his note for the difference between the price of wheat at the time of sale and at the time fixed for delivery; the note becoming due and being unpaid, B brought an action upon it. Can he recover? ✓.

13. A pedestrian was run over and killed by a railway train at a street crossing, and an action was commenced by his personal representatives against the railroad company to recover damages therefor. Upon the trial the plaintiff introduced evidence showing that the deceased came to his death through the negligence of the agents of the defendants in the management of the train, but which did not negative the possibility of contributory negligence on the part of the deceased at the time of the accident. The plaintiff rested, whereupon the defendant moved for a nonsuit. Should the motion be granted?

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